Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1995

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PAUL ELIE and EDGAR C. ELIE,
*Petitioners,*

v.

MARVIN BROXMEYER,
*Respondent.*

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**Petition for a Writ of Certiorari to the Supreme Court of the State of Florida**

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## PETITION FOR A WRIT OF CERTIORARI

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128 pp

## QUESTIONS PRESENTED FOR REVIEW

The Questions Presented for Review are stated here in their reverse Order so that the order of importance is more readily ascertainable to the Court.

1. May a party who noticed appeal from a state trial court's judgment, and thereafter filed a voluntary Chapter 7 Bankruptcy, pursue that appeal without specific authorization to do so from the Bankruptcy Court, without the posting of a bond on behalf of the Estate, and without substituting the Trustee and Chapter 7 Bankruptcy Estate, over objection of Appellee?

2. Does Article V, Section 3(b)(3) Of the Florida Constitution, as applied, violate the Fourteenth Amendment's guarantee of Equal Protection and Due Process, where a party who loses at trial may notice an appeal as a matter of right pursuant to State law, in an intermediate level appellate court, and can prevail, but that the losing party on appeal, if the prevailing party at trial, has no direct right of review of any errors committed by the appellate court in reaching its decision?

**STATEMENT PURSUANT TO RULES 14.1(b) AND 29.1**

All revelant parties to this Petition are named in the caption; however, the proceedings below involved the Petitioner, Respondent (1 & 2 below) and several other parties. Suit has been settled with all parties below except the Respondent.

1. Paul Elie and Edgar C. Elie, Petitioners
2. Marvin Broxmeyer, Respondent
3. Judith Broxmeyer
4. Royal Rehab Corp., a Florida Corporation
5. Cantor Samuel, Inc., a Florida Corporation
6. Levlex Enterprises, Ltd., a New York Corporation
7. Restoration Resources, Inc., a Florida Corporation
8. Dobrick, Inc., a Florida Corporation
9. Marcia T. Dunn, Esquire, Chapter 7 Trustee
10. James M. Feltman, Chapter 7 Trustee
11. Raymond H. Alfonso

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## PETITION FOR A WRIT OF CERTIORARI

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### INTRODUCTORY PRAYER

Appellants PAUL ELIE and EDGAR C. ELIE pray this Court to grant their petition for certiorari to review an adverse decision by the Supreme Court of the State of Florida, sub nom. Fourth District Court of Appeal, State of Florida.

### CITATIONS TO OPINIONS BELOW

The decision of the Florida Supreme Court is not reported. (*see* Appendix 1a).

The decision of the Fourth District Court of Appeal, State of Florida, is reported at 647 So.2d 893 (Fla. 4th DCA 1995) (*see* Appendix 2a through 4).

## JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) because the appellants seek review of an adverse decision rendered final and reviewable here by the Supreme Court of the State of Florida, and involves an important Federal question regarding Bankruptcy law.

## STATUTORY PROVISIONS INVOLVED

The primary statutory provisions involved herein are:

I. 11 U.S.C. § 541. Property of the [bankruptcy] estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all of the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case. . . . (*et seq.*).

II. 11 U.S.C. § 362. Automatic stay [bankruptcy estate].

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securiteis Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of— . . . . (*et seq.*).

## CONSTITUTIONAL PROVISIONS INVOLVED

I. Article V, Section 3(b)(3) of the Florida Constitution.

(b) JURISDICTION.—The supreme court:

(3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that ex-

pressly affects a class of constitutional or state officers, or that expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.

## STATEMENT OF THE CASE

### A. Preliminary Jurisdictional Facts

On June 8, 1995 the Supreme Court of Florida declined to review the Opinion of the District Court of Appeal, Fourth District of Florida (hereinafter District Court of Appeal, one of Florida's intermediate level appellate courts). The basis was Article V, Section 3(b)(3) of the Florida Constitution. Appendix A-1. *Elie v. Broxmeyer*, Supreme Court of Florida, Case No. 85,072 (Fla., June 8, 1995). The Opinion of the District Court of Appeal is found at *Broxmeyer v. Elie*, 647 So.2d 893 (Fla. 4th DCA 1994). App. 2a-5a.

The judgment of the District Court of Appeal follows a Verdict and Judgment entered on August 20, 1992 and August 26, 1992 respectively. App. 6a-12a.

The Petitioners filed a Motion for Rehearing as to the Opinion of the District Court of Appeal, on December 1, 1994. App. 13a-34a. Rehearing was denied December 28, 1994. App. 35a. Thereafter a Notice to Invoke Jurisdiction in the Supreme Court of Florida was filed on January 24, 1995. App. 36a-42a. The Supreme Court of Florida declined to review the Appellate Court Opinion based upon Article V, Section 3(b)(3) of the Florida Constitution, which does not provide for review of errors in the District Courts of Appeal unless the opinion *expressly and directly* conflicts with the opinions of other District Courts of Appeal or the Florida Supreme Court on the same points of law. Appendix 1a.

The Supreme Court of Florida is the highest court of competent jurisdiction in the State of Florida. However,

the Florida Supreme Court can only exercise, except in a few cases, limited discretionary review. As a result, the *prevailing* party at trial, who loses on appeal, has no direct right to review errors by the appellate court, while the *losing* party at trial has an absolute right of appellate review.

**B. Undisputed Facts Forming the Statement of the Case**

In the years 1986 through 1988, Respondent Marvin Broxmeyer associated with one Raymond H. Alfonso (Alfonso), a judgment debtor of the Petitioners. During Respondent's association with Alfonso, Respondent assisted Alfonso in hiding Alfonso's assets from Petitioners, Alfonso's creditors. In 1988 Alfonso filed a voluntary Chapter 7 Bankruptcy case in the Southern District of Florida and Alfonso was denied discharge pursuant to 11 U.S.C. § 727(a)(4) (false oath or affirmation in or in connection with a bankruptcy case). *In re: Alfonso,* 94 B.R. 777 (Bankr. S.D. Fla. 1988). The denial of discharge followed suit by Alfonso's bankruptcy trustee's discovery that Alfonso had concealed his assets and his interests in various business ventures that included Respondent.

In December, 1990, Petitioners filed suit against Respondent and others (who are not parties to this petition) for civil conspiracy to conceal the assets of Alfonso as Petitioners' judgment debtor and in the alternative for an accounting of Alfonso's assets (following a turnover proceeding in the case below).

The case went to trial, the accounting pending the determination of whether or not Petitioners were entitled to money damages in the alternative. Thereafter a verdict was returned in Petitioners' favor (App. 6a-8a) and a money judgment was entered aaginst Respondent (App. 9a-12a).

After the money judgment was entered against Respondent, he among the other then-defendants, filed a Notice of Appeal invoking the mandatory jurisdiction of

the District Court of Appeal, Fourth District of Florida ("District Court of Appeal") on October 10, 1992. App. 71a-76a.

After filing a Notice of Appeal, Respondent, filed a voluntary bankruptcy under Chapter 7 of Title 11 of the United States Bankruptcy Code on April 1, 1993. Up until this time no brief had been filed in behalf of Respondent. Thereafter, Petitioners filed motions in the District Court of Appeal to stay appellate proceedings or dismiss the pending appeal on various bases all connected with the bankruptcy filings. App. 43a-68a. The Appellate Court refused each motion and moved forward with the Appellate proceedings over Petitioners' objection and upon pain of sanctions. App. 69a-70a.

Marvin Broxmeyer's Estate was never authorized by the Trustee or the Bankruptcy Court to move forward on the appeal and there is no record evidence of that authorization.

In no event did the Respondents' bankruptcy trustee participate in the appellate proceeding.

No order of the Bankruptcy Court expressly authorized the Respondent to represent the Bankruptcy Estates or the Trustee. Furthermore, the prosecution of the appeals was done without the posting of any bond by Respondent.

Over the repeated objections by Petitioners to the District Court of Appeal's jurisdiction, it rendered its opinion. App. 2a-5a.

After reversal on appeal, Petitioners contended that the Appellate Court had substituted its view of the evidence for that of the trial judge and jury, despite their objections to the continued prosecution of the appeal below due to the Bankruptcy filings. Consequently, there are two distinctly Federal issues raised: 1) Does Florida's appellate scheme, as mandated by the Florida State Constitution, deprive prevailing parties at trial of equal protection or due process rights under the Federal Constitution, and;

2) Did the Respondents herein, and the Florida intermediate appellate court, violate the strictures of Federal Bankruptcy law by continuing to prosecute and determine the State Court appeals without the consent or participation of the Federal Bankruptcy Court or the Bankruptcy Trustee?

This proceeding is brought pursuant to Article III of the United States Constitution, 28 U.S.C. § 1257(a), Rule 10.1(b) of this Court, and the Court's inherent jurisdiction to grant Certiorari in all matters bearing inquiry upon a Federal Question based upon an actual case and controversy.

## REASONS FOR GRANTING THE PETITION

### I. FLORIDA CONSTITUTIONAL PROVISION PREVENTED THE FLORIDA SUPREME COURT FROM LOOKING TO THE RECORD OF THE PROCEEDINGS BELOW AND AFFORDING PETITIONERS FULL REVIEW AS TO THE FEDERAL BANKRUPTCY ISSUES AND WHETHER OR NOT THE DISTRICT COURT OF APPEAL SUBSTITUTED ITS VIEW OF THE EVIDENCE FOR THE TRIER OF FACT.

Article V, Section (3)(b)(3) of the Florida Constitution provides as follows:

> (b) JURISDICTION.—The supreme court:
>
> (3) May review any decision of a district court of appeal that expressly declares valid a state statute, or that expressly construes a provision of the state or federal constitution, or that expressly affects a class of constitutional or state officers, or that *expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law.* (emphasis supplied).

This provision severely limits and curtails meritorious review of opinions written by lower appellate courts, such that a party who *loses on appeal,* after winning at trial,

may not have any errors of the appellate court reviewed by the Florida Supreme Court, unless the opinion itself expressly and directly conflicts with a decision of another district court of appeal or of the Florida Supreme Court on the same question of law.

This scheme, however, disregards a compelling point that should be addressed by this Court: where a State Court Plaintiff wins at trial. and the Defendant has an absolute right to meritorious review on appeal which is *not* discretionary, *despite form or substance of the trial court's judgment,* should the Plaintiff/Appellee, consistent with Due Process and Equal Protection, be permitted an *equal* right of *mandatory* review for error in the Appellate Court? Especially where, as here, the allegation is that the appellate court has wrongfully asserted jurisdiction or wrongfully substituted its view of the evidence for that of the trier or fact but has precluded review of the Opinion by improperly using Florida's "express conflict" provision. Under Article V, Section 3(b)(3) of the Florida Constitution, the form or substance of the Appellate Opinion *dictates* whether or not meritorious review may be had in the Florida Supreme Court. Absent an opinion written "with an eye towards review", the Florida Supreme Court is *forbidden* under Article V, Section 3 (b)(3) to look to the "record proper" in order to determine either conflict, error, or wrongful conduct of the district court of appeal. This leaves open the possibility, as Petitioners contend here and contended below, for the appellate court to wrongfully or erroneously do that which it is forbidden to do, *and escape meritorious review* in the Florida State court system. In short, there is no oversight by the Florida Supreme Court of the appellate courts and their mandates, unless the appellate courts write opinions which expressly and directly conflict with decisions of other appellate courts or the Florida Supreme Court on the same questions of law.

Article V, Section 4(b)(1) of the Florida Constitution provides:

(b) JURISDICTION.—

(1) District courts of appeal shall have jurisdiction to hear appeals, that may be taken *as a matter of right* from final judgments or orders of trial courts, including those entered on review of administrative action, not directly appealable to the supreme court or a circuit court. They may review interlocutory orders in such cases to the extent provided by rules adopted by the supreme court. (emphasis supplied).

Therefore, if a trial judge substituted his view of the evidence for that of the trier of fact (e.g. the jury), that decision would be reviewable as a *matter of right*. Cf. § 59.06, *Florida Statutes* (1994). *Marcellis v. George*, 202 So.2d 107 (Fla. 4th DCA 1967). The appellate court is permitted—in fact required—to look to the "record proper" and decide the merits of all of the question presented.

In *Florida Star v. B.J.F.*, 484 U.S. 984, 98 L.Ed.2d 498, 108 S.Ct. 499 (1987) this Court certified to the Florida Supreme Court the question of whether or not the Florida Supreme Court was the final court for review of a question, or whether or not the District Court of Appeal, First District of Florida was the court of "last resort", pursuant to Article V, Section 3(b)(3) of the Florida Constitution. The Florida Supreme Court in an opinion published at *The Florida Star v. B.J.F.*, 530 So.2d 286 (Fla. 1988) answered the question stating that the Florida Supreme Court was the "court of last resort"; *however* stating that Florida's Supreme Court jurisdiction is severely limited under Article V, Section (3)(b)(3). In *B.F.J.* the Florida Supreme Court had previously denied Certiorari review of the question then presented to this Court. *The Florida Star v. B.J.F.*, 509 So.2d 1117 (Fla. 1987).

Upon certification to this Court, the Florida Supreme Court in *B.J.F.*, 530 So.2d at 288 stated:

> [T]his Court in the broadest sense has subject-matter jurisdiction under article V, section 3(b)(3) of the Florida Constitution, over any decision of a district court that expressly addresses a question of law within the four corners of the opinion itself. That is, the opinion must contain a statement or citation effectively establishing a point of law upon which the decision rests.

The *B.J.F.* Court, *id.*, in answering this Court's certified question, further responded that the discretion and the jurisdiction of the Florida Supreme Court to review is so restricted that an opinion which *conforms* to form and formal substance, though erroneous, is capable of escaping any meaningful review in that court by State Constitutional Mandate. In short, an appellate court could and in this case did, intentionally err by substituting its view of the trial evidence for that of the trial judge and jury, and in fact *intentionally ignored* the bankruptcy issues. In short, an appellate court in Florida could and in this case did, intentionally and wrongfully exert jurisdiction (ignoring the bankruptcy issues), and then erred or intentionally committed "error" by substituting its view of the trial evidence for that of the trial judge and jury.

This Court in the *B.J.F.* case noted probable jurisdiction. 488 U.S. 887, 102 L.Ed. 208, 109 S.Ct. 216 (1988). Ultimately, Article V, Section (3)(b)(3) (1980) escaped this Court's review. *B.J.F.*'s sole distinction was that the appellant both here and in the Florida Supreme Court lost at *all levels* in the state court system. The issue presented here with respect to Article V, Section (3)(b)(3) was then not ripe for review and the question was not passed upon, but rather passed over to reach the First Amendment question then presented.

The Florida Supreme Court has interpreted Article V, Section 3(b)(3) of the Florida Constitution as being one so limited in its application that it precludes virtually all review of erroneous rulings in the lower appellate courts,

except for those opinions which eke past the restrictive Constitutional Mandate.

The purpose of the implementation of this limitation is found in the committee notes to Florida Rule of Appellate Procedure 9.030(a)(2)(A)(iv), 1980 Amendment, which states:

> Subdivision (a)(2)(A)(iv) represents the most radical change in the supreme court's discretionary jurisdiction. The predecessor article V vested the supreme court with power to review district court decisions "in direct conflict with a decision of any district court of appeal or of the Supreme Court on the same point of law." These cases comprised the overwhelming bulk of the court's caseload and gave rise to an intricate body of case law interpreting the requirements for discretionary conflict review. With the enunciation of the "record proper rule" in *Foley v. Weaver Drugs, Inc.*, 177 So.2d 221 (Fla. 1965), the supreme court extended its discretionary review in instances of discernible conflict to district court decisions affirming without opinion the orders of trial courts. Amended Article V abolishes the *Foley* doctrine by requiring an "express" as well as "direct" conflict of district court decisions as a prerequisite to supreme court review. The new article also terminates supreme court jurisdiction over purely intradistrict conflicts, the resolution of which is addressed in rule 9.331.

In *Jenkins v. State*, 385 So.2d 1356 (Fla. 1980), a Per Curiam Affirmed opinion of the lower appellate court, containing a dissenting opinion, was found insufficient to sustain review. Certiorari was dismissed, but not without Justice Atkins' dissenting opinion. *Id.* at 1363. Justice Adkins outlined the quagmire in which these Petitioners are now caught. If the District Court of Appeal chose to substitute its view of the evidence for that of trier of fact, under Florida's law such action would have been impermissible. *Odoms v. Travelers Insurance Company*,

339 So.2d 196 (Fla. 1976); *Westerman v. Shell's City*, 265 So.2d 43 (Fla. 1972). However, for the Florida Supreme Court to review this error, the opinion of the appellate court must show *somewhere in its language* that the appellate court has committed this transgression, or that its opinion expressly and directly conflicts with the opinion of another district court of appeal or the Florida Supreme Court on the same issue of law.

*However*, once the Florida Supreme Court takes jurisdiction because of conflict on one issue, *it may decide all issues. Banker's Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (Fla. 1985) citing *Bould v. Touchette*, 349 So.2d 1181 (Fla. 1977). So, the Florida Supreme Court cannot review "the record proper" for any evidence that the District Court of Appeal substituted its view of the evidence for that of the trial judge and trier of fact, and its intentional disregard of the bankruptcy issues and the Federal bankruptcy law. Fla.R.App.P. 9.030(a)(2)(A)(iv) committee notes, supra; *Jenkins*. Therefore, absent proper form of the appellate court's opinion, the Florida Supreme Court cannot inquire into any impropriety of the appellate court's actions, no matter how egregious the error may be. However, where a trial court does so, a party who loses at trial has an *absolute* statutory and constitutional right of review to determine the same. Article V, Section 4(b)(1), Florida Constitution. *Macrellis*, supra.

In the case below, the District Court of Appeal continued to exercise jurisdiction when it was no longer permitted to do so because of the Federal bankruptcy law, and then substituted its view of the evidence for that of the trier of fact. As the losing party on appeal, Petitioners, the prevailing party at trial, *cannot* have those errors reviewed in a higher court. So there exists both a clear departure from the essential requirements of law coupled with no possibility of even discretionary review.

Justice Adkins' dissent in *Jenkins* is repeated in *Dodi Publishing Co. v. Editorial America, S.A.*, 385 So.2d 1369 (Fla. 1980); *Pena v. Tampa Federal Savings and Loan Association*, 385 So.2d 1370 (Fla. 1980); and concurred in result only as to *Stevens v. Jefferson*, 436 So.2d 33 (Fla. 1983). The few times that the Florida Supreme Court has ever departed from the strictures of Article V, Section (3)(b)(3) (1980) are *Stevens* and *Banker's Multiple Line Insurance Co. v. Farish*, 464 So.2d 530 (1985). In *Stevens* the Fifth District Court of Appeal, State of Florida, entered a "per curiam affirmed" noting "probable" conflict with another district court opinion. However, the per curiam affirmed contained no opinion other than citations of authority. Justice Boyd's dissent in *Farish* quotes *Jenkins* repeatedly. Thus, unless the appellate court "consents" to review by the Florida Supreme Court, it may rule any way it wishes without any oversight whatsoever, thus "bullet-proofing" its decisions. There is simply no accountability.

Although this Court has held in many instances that a right to appeal is not constitutionally guaranteed, where a *State* provides a first, *absolute* right of appeal, then Due Process and Equal Protection guarantees must be implemented in the appellate process. *Douglas v. California*, 372 U.S. 353, 9 L.Ed.2d 811, 83 S.Ct. 814 (1963); *Griffin v. Illinois*, 361 U.S. 12, 100 L.Ed. 891, 76 S.Ct. 585, 55 ALR2d 1055 (1956); *Evitts v. Lucey*, 469 U.S. 387, 83 L.Ed.2d 821, 105 S.Ct. 830 (1985). In the foregoing cases, this Court has found that effective assistance of counsel, rights of indigent criminal appellants to certified transcripts, and right to review on the merits were all inherently guided by Federal Constitutional principals necessitating *fair play and meritorious review.*

Florida's Constitution, Article V, Section (3)(b)(3), *as applied* and as pointed out in Justice Adkins' dissent in *Jenkins*, denies meritorious review, and prevents the Florida Supreme Court from "looking to the record

proper" or exercising oversight in any cases where a party prevails at trial, and on appeal is reversed because the losing party at trial has an absolute right of appeal. The appellate loser may then only seek review of the appellate court's errors in such limited circumstances as to prohibit introduction of the *evidence* of the error to the reviewing court. This is compounded especially where the appellate court has exercised jurisdiction where it could not, as here, in light of the bankruptcy cases, bankruptcy settlement agreement and bankruptcy court orders approving the same.

Article V, Section (3)(b)(3) (1980) of the Florida Constitution is unconstitutional *as applied*, rather than as it was intended. It provides that while a certain class of litigants have an *absolute* right of meritorious review in the appellate courts of Florida, another class of litigants *tied to the same litigation* have no right of meritorious review, where they are the winners at trial, but the losers on appeal due to appellate error, especially where there may have been no jurisdiction. This violates the Fourteenth Amendment's commands of Due Process and Equal Protection. It also invades the Sixth Amendment's command to a fair and impartial hearing, if, under the circumstances, the District Court of Appeal did improrely exercise its jurisdiction and substituted its view of the evidence for that of the trial judge and jury.

In *Mooney v. Holohan*, 294 U.S. 103, 79 L.Ed. 791, 55 S.Ct. 340, 98 ALR 406 (1935), this Court found that the knowing use of perjured testimony, and deliberate suppression of evidence constituted a denial of due process. Due process cannot be complied with where "the State has contrived a conviction through the pretense of a trial which in truth is but used as a means of depriving a defendant of liberty through deliberate deception of court and jury. . . . Such a contrivance by a State to procure the conviction . . . is inconsistent with the rudimentary demands of justice as is the obtaining of a like

result by intimidation." *Id.* at 112, 79 L.Ed 791, 55 S.Ct. 340, 98 ALR 406. Cited by Justices Stevens and Blackmun, dissenting in *Albright v. Oliver,* 510 U.S. ——, 127 L.Ed.2d 114, 140, 114 S.Ct. —— (1994). Likewise in *In re: Murchison,* 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1945), this Court found that Due Process requires a fair hearing. Article V, Section 3(b)(3) prohibits the Florida Supreme Court from determining whether a fair hearing was afforded, whether jurisdiction was improperly exercised, or whether or not error was committed at all. Likewise it prohibited the Florida Supreme Court from considering the next issue brought here, II, below.

Petitioners submit to this Court that the state constitutional provision in issue in this case is far too narrow, thus violating due process and substantive due process.

As set forth in *Jenkins,* the purpose of the state constitutional provision was to prevent "per curiam opinions," e.g. opinions which simply affirmed or reversed, without any opinion, and perhaps citing some authority, from reaching the Florida Supreme Court for review. The constitutional provision was intended to make the District Courts of Appeal "the final court of review" as pertains to "per curiam affirmed" decisions. However, in its dragnet, the provision *as applied* actually ensnares written opinons, with citations of authority, from reaching meritorious review simply because the opinions *on their face* do not expressly and directly conflict with opinions of other district courts of appeal or the Florida Supreme Court on the same issue of law.

However, Article I, Section 21 of the Florida Constitution guarantees to each Florida Citizen, the broadest protections of law, and commands that:

> The courts shall be open to every person for redress of any injury. . . .

This broad command, coupled with the constitutional referendum put to the people as pointed out by Justice

Adkins in *Jenkins* was simply undercut. Justice Adkins aptly explained that the referendum was so broadly written, that the electorate, presumably a populace of reasonably prudent individuals of average intelligence, could not have known what it was they voted for. And indeed this was the case. Further, it was the Florida Supreme Court itself that in fact wrote the proposed amendment and the proposed referendum, not the citizens of Florida or their legislators. *Jenkins.*

The purpose of Article V, Section 3(b)(3) was to prevent abuses, and in the process it has now spawned due process abuses.

## II. HAD THE FLORIDA SUPREME COURT BEEN PERMITTED TO REVIEW THE RECORD BELOW, THE FEDERAL QUESTION COULD HAVE BEEN READILY DETERMINED, AS, FLORIDA LAW FOLLOWS THE MAJORITY OF THE UNITED STATES CIRCUIT COURTS OF APPEALS WITH RESPECT TO CHOSES IN ACTION BELONGING TO A BANKRUPT'S ESTATE.

11 U.S.C. § 541(a), the United States Bankruptcy Code, provides that all property belonging to the Debtor at the time of the filing of a Chapter 7 bankruptcy proceeding, is property which belongs to the Estate and is charged to the possession and control of the Chapter 7 Trustee. Such property includes all rights legal or equitable, tangible or intangible, and *choses in action. Camp v. St. Paul Fire & Marine Ins. Co.,* 616 So.2d 12 (Fla. 1993).

The Respondent is a Chapter 7 bankrupt. At the time he filed a Notice of Appeal, October 10, 1992, he was not in bankruptcy. App. 71a-76a. However, subsequent to filing the Notice of Appeal, and before *any briefs were submitted,* Respondent filed a voluntary Chapter 7 Bankruptcy on April 1, 1993. Thus both 11 U.S.C. § 541(a) and 11 U.S.C. § 362(a) came into effect and

both stayed the appeal and also provided the Trustee an opportunity to pursue, abandon, or dismiss the appeal, or compromise the claim.

Petitioners in numerous instances sought to stay or otherwise dismiss the appeal before the District Court of Appeal on the grounds that the Respondent was violating the automatic stay and that the failure to stay those proceedings pending further orders of the Bankruptcy Court was also violative of 11 U.S.C. § 362(a). App. 43a-68a. Failure to comply with the bankruptcy law would lead to possible inconsistent results and constituted the "whipsawing" of Petitioners between various courts. The purposes of the Automatic Stay provisions of the Bankruptcy Code, and concomitant provisions of 11 U.S.C. § 541(a) are to maintain the *status quo* and preserve the rights of creditors.

Subsequent to the Petitioners' various motions to stay the appellate proceedings in the District Court of Appeal, *that court*, following a *majority of the United States Circuit Courts of Appeals*, ruled in another case, en banc, that it *was stayed* from any actions pursuant to 11 U.S.C. § 362(a), for the reasons set forth in Petitioners' arguments here and before that court. *Florida Eastern Development Company, Inc. of Hollywood v. Len-Hal Realty, Inc.*, 636 So.2d 756 (Fla. 4th DCA 1994). Subsequently, the District Court of Appeal *continued* to ignore Petitioners' pleadings and continued to consider the appeal notwithstanding the stay and the implications of 11 U.S.C. § 541(a), 11 U.S.C. § 362(a), or the *Len-Hal Realty, Inc.* decision *of that same Court*. *See* citations of authority in *Len-Hal Realty, Inc.*

That 11 U.S.C. § 541(a) and 11 U.S.C. § 362(a) control appellate proceedings in both a lower court and on appeal is axiomatic. See citations set forth in *Len-Hal Realty, Inc.* More specifically, in *In Re: Yonikus*, 996 F.2d 866 (7th Cir. 1993) the Seventh Circuit held that a worker's compensation claim and lawsuit alleging dam-

ages for the same incident are "property of the estate" which must be reported on the debtor's schedule of assets and are property of the Trustee and the estate. 11 U.S.C. § 541(a) supersedes § 70(a) of the former Bankruptcy Act. *Id.* Congress intended that all property belonging to the Estate come into the Estate, and thereafter exemptions claimed by a debtor would be determined by the bankruptcy court. Thus, Congress in effect overruled this Court's opinions in *Lockwood v. Exchange Bank,* 190 U.S. 284 (1903) and *Lines v. Frederick,* 400 U.S. 18, 27 L.Ed.2d 124, 91 S.Ct. 113 (1970). However, even in *Kokoszka v. Belford,* 417 U.S. 642, 41 L.Ed.2d 374, 94 S.Ct. 2431 (1974), this Court recognized that a right to an income tax refund was property of the Estate subject to a turnover order.

Likewise, the Eleventh Circuit in *In re: Holywell Corp.,* 913 F.2d 873 (11th Cir. 1990), held that upon filing of a bankruptcy petition, a debtor-partner's partnership interest became property of the Estate and the bankruptcy court retained jurisdiction to approve the trustee's settlement of a dispute between the debtor-partner and a non-debtor partner.

Thus, a shareholders' derivative suit for recovery of diminution in value of the debtor corporation's stock caused by the tortious acts of either an officer or director or third person belongs primarily to the debtor corporation, and therefore is within the jurisdiction of the bankruptcy court. *Griggin v. Bonapel* (In re: All American of Ashburn, Inc.), 805 F.2d 1515 (11th Cir. 1986). Choses in action that are "nonassignable" under state law are nonetheless property of the Estate. *Sierra Switchboard Co. v. Westinghouse Electric Corp.,* 789 F.2d 706 (9th Cir. 1986).

In essence every possible or even remotely contingent and litigable right constitutes property of the Estate and is subject to the jurisdiction of the bankruptcy court and belongs to the Chapter 7 Trustee—not the debtor. Like-

wise, the Respondent had no authority to prosecute his appeal after filing bankruptcy in Chapter 7, without proper authority from the bankruptcy court and the Trustee. Since no such authority was ever properly set forth, the District Court of Appeal improperly considered the proceedings even though Respondent had *absolutely no standing to prosecute his appeal,* and the District Court of Appeal had no jurisdiction to further entertain it without proper authority from the Bankruptcy Court.

As the Eleventh Circuit Court of Appeal noted in *Jones v. Harrell,* 858 F.2d 667 (11th Cir. 1988), the authority to settle and likewise prosecute a claim belongs to the Trustee and the Estate post-petition, *not the debtor.* See *Harrell* at 669-70. There was no reason why the Petitioners should have been denied the benefit of dealing with the Bankruptcy Trustee, the Respondent's Estate and the Bankruptcy Court, by the State Court.

Respondent sought no action in the Bankruptcy Court with respect to his prosecution of the appeals. His Trustee neither abandoned, nor did Respondent seek to compel his Trustee to abandon or prosecute his appeal. In fact, Mr. Broxmeyer's bankruptcy Trustee was not even subjected to a motion to either abandon or prosecute the same. Ultimately, Mr. Broxmeyer conceded liability, by *voluntarily* defaulting on an adversary proceeding objecting to discharge, after being represented by counsel. The default established the allegations of the adversary complaint, one of which was the continued prosecution of the appeal without authority or stay relief. App. 77a-93a (excludes exhibits to the complaint which are irrelevant here). See especially, however, App. 86a (Count VI of the adversary complaint).

Since the reversal of the original judgment, Respondent Marvin Broxmeyer has sought "restitution" from the Petitioners. The State trial court has entered such an order. App. 94a-99a.

It is axiomatic that the Due Process Clause supersedes the jurisdiction of any State and its sovereign courts. Amendment XIV of the United States Constitution binds all States to its commands. Further, with respect to Bankruptcy law, Article I, Section 8, Cl. 4 of the United States Constitution commands that Congress shall legislate in the area of Bankruptcies, and Article VI, Cl. 2 of the United States Constitution provides that all laws in pursuance of the United States Constitution shall be supreme and the Judges in every state are bound thereby.

As this Court aptly pointed out in *Sperry v. Florida,* 373 U.S. 379, 10 L.Ed.2d 428, 83 S.Ct. 1322 (1963), in a case on this point, The Florida Bar was found to have no jurisdiction to attempt to regulate the practice of patent law before the U.S. Patent Office or its Commissioner. The Supremacy Clause of the United States Constitution was therefore reaffirmed. In *Florida v. Meyers,* 466 U.S. 380, 80 L.Ed.2d 381, 104 S.Ct. 1852 (1984), the Florida Supreme Court denied review, though a Federal question was presented. In absence of meaningful review, this Court took jurisdiction and reversed the Fourth District Court of Appeal. It was pointed out in the dissent (Stevens, J. with Brennan and Marshall, JJ. concur dissenting) that the Florida Supreme Court merely denied certiorari without any reason. Unlike *Meyers,* in this case, review was denied specifically because of Article V, Section 3(b)(3) of the Florida Constitution, and so jurisdiction on both the Federal question and ultimately the Constitutional questions are ripe for review.

The prosecution of the appeals to the District Court of Appeal was without any authority by Respondent. This issue could not be reached by the Florida Supreme Court as Article V, Section 3(b)(3) of the Florida Constitution provides that the Florida Supreme Court cannot determine the rulings of the Appellate Court unless the lower decision expressly and directly conflicts with the other district courts of appeal or the Florida Supreme Court on

the same question of law. Since the opinion of the District Court of Appeal contained no reference to the bankruptcy matters, the Florida Supreme Court found that it had no jurisdiction to review the Fourth District Court of Appeal's rulings.

## CONCLUSION

For the foregoing reasons, Appellants/Petitioners respectfully request this Court to grant their petition for a writ of certiorari to review the decision of the Florida Supreme Court, and sub nom. the District Court of Appeal, Fourth District of Florida.

Respectfully submitted,

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*(Counsel of Record)*
LAW OFFICES OF
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*Paul Elie and Edgar C. Elie*

**APPENDIX**

SUPREME COURT OF FLORIDA

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THURSDAY, JUNE 8, 1995

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Case No. 85,072

District Court of Appeal, 4th District No. 92-2900

PAUL ELIE, *et al.*,
*Petitioners,*

v.

MARVIN BROXMEYER, *et al.*,
*Respondents.*

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This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

SHAW, KOGAN, HARDING, WELLS and ANSTEAD JJ., concur

# DISTRICT COURT OF APPEAL OF FLORIDA
# FOURTH DISTRICT

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No. 92-2900

MARVIN BROXMEYER, JUDITH BROXMEYER, LEVIEX ENTERPRISES, LTD., ROYAL REHAB CORP. and CANTOR SAMUEL, INC.,

*Appellants/Cross-Appellees,*

v.

PAUL ELIE, EDGAR C. ELIE, STEVEN R. BROWNSTEIN and RAYMOND H. ALFONSO,

*Appellees/Cross-Appellants.*

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Nov. 16, 1994

Rehearing Denied Dec. 28, 1994

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KLEIN, Judge.

The Broxmeyers appeal a judgment entered against them based on conspiracy, arguing that there was no conspiracy, and that the Elies did not prove any damages in any event. We agree that there was no proof of damages, so we need not decide if there was a conspiracy.

The Elies obtained judgments against Raymond Alfonso totalling $2,008,694 in 1990. Because they were unable to collect their judgments against Alfonso, the Elies brought this action against the Broxmeyers. They alleged that the Broxmeyers participated in a conspiracy which made Alfonso judgment-proof, and thus made it impossible for the Elies to collect their judgments against Alfonso.

The facts underlying the alleged conduct against the Broxmeyers involved a corporation owned by the Broxmeyers and Alfonso which engaged in real estate transactions. The corporation was formed in Texas in April of 1987, with Mr. Broxmeyer owning 80% of the stock and Alfonso owning 20%. Viewed in a light most favorable to the Elies, the evidence reflected that Alfonso did not want his stock in his own name because of various creditors who were hounding him, that the Broxmeyers knew this, and that the Broxmeyer's consented to Alfonso's stock being issued to Alfonso's mother, Ernestine Alfonso. The corporation acquired, rehabilitated, and disposed of properties in Texas from 1987 through 1989.

The essence of the Elies' complaint against the Broxmeyers was that because the Broxmeyers allowed Alfonso's stock to be issued to Alfonso's mother, the Elies were unable to collect their 1990 judgments against Alfonso by levying on the stock.

At trial, the Elies did not present any competent evidence to prove the value of Alfonso's stock at the time the stock was issued to Alfonso's mother in 1987, or at any time thereafter. The Elies' counsel recognized his inability to establish the value of the stock, and persuaded the trial judge to submit two interrogatory verdicts on damages to the jury which were as follows:

> 9. What is the dollar amount of the reduction in value of the stock as a result of the mingling, damage or dissipation caused by the acts of the Defendants since the date of the concealment? If you cannot decide the dollar amount in reduction in value of the stock, do NOT answer this question and go to question number 10. $—— (Do NOT fill in this space if you are unable to determine the dollar amount of the reduction in value of the stock).
>
> 10. What dollar amount will fairly compensate the Plaintiffs (answer this question ONLY if you did

not answer question number 9). $—— (fill in this space ONLY if you did not answer question number 9).

The jury did not answer interrogatory number 9, but did answer interrogatory number 10 and awarded damages of $1,700,000. The only evidentiary basis in the record which the Elies suggest will support this amount is that it approximately corresponds to the face amount of the judgments the Elies had against Alfonso, excluding attorneys' fees and costs. The obvious problem with that argument is that the amount of the Elies' judgments against Alfonso would have no bearing on how much damage was caused by the alleged fraudulent transfer, except to put a limit on the amount the Elies could recover from the Broxmeyers.

As support for their argument that they can recover, notwithstanding their admitted inability to prove damages, the Elies rely on *Winn & Lovett Grocery Co. v. Saffold Bros. Produce Co.*, 164 So. 681 (Fla.1935). In *Winn & Lovett* a fraudulent transferee had dissipated the property, so that the creditor of the fraudulent transferor could not establish the value of the property at a relevant time after the fraudulent transfer. The court held that under those circumstances judgment may be entered against the transferee for the value of the property at the time the transferee took physical possession of the property. The present case is distinguishable from *Winn & Lovett* because in the present case there was no proof of the value of the property at the time of the alleged fraudulent transfer.

We need not decide whether the other elements of conspiracy were established, since "the law furnishes a remedy only for such wrongful acts as result in injury or damage." *Scott-Stephen Develop. Corp. v. Gables By The Sea, Inc.*, 167 So.2d 763 (Fla. 3d DCA 1964). Where there is no proof of damages, there can be no recovery. *Ryan v. Atlantic Fertilizer & Chemical Co.*,

515 So.2d 324 (Fla. 3d DCA 1987) and *All Florida Surety Co. v. Vann*, 128 So.2d 768 (Fla. 3d DCA 1961).

We therefore reverse the denial of the Broxmeyers' motion for directed verdict and remand for judgment to be entered in their favor.

HERSEY and STONE, JJ., concur.

IN THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

---

Case No.: 90-37325(16)

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PAUL ELIE and EDGAR C. ELIE,
*Plaintiffs,*

vs.

LEVLEX ENTERPRISES, LTD.,
a New York Corporation, *et al.*,
*Defendants.*

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## VERDICT FORM

WE THE JURY IN THE ABOVE-STYLED AND ENTITLED CAUSE DO HEREBY RETURN THE FOLLOWING VERDICT:

1. Did Defendant, MARVIN BROXMEYER, conspire to conceal property of RAYMOND H. ALFONSO to avoid the Plaintiffs as creditors of RAYMOND H. ALFONSO?

✔ ____
YES NO

2. Did Defendant, JUDITH BROXMEYER, conspires to conceal property of RAYMOND H. ALFONSO to avoid the Plaintiffs as creditors of RAYMOND H. ALMONSO?

✔ ____
YES NO

3. Did the Defendant, ROYAL REHAB CORP., a Florida Corporation, conspire to conceal property of

RAYMOND H. ALFONSO to avoid the Plaintiffs as creditors of RAYMOND H. ALFONSO?

✔ ____
YES NO

4. Did the Defendant, CANTOR SAMUEL CORP., a Florida Corporation, conspire to conceal property of RAYMOND H. ALFONSO to avoid the Plaintiffs as creditors of RAYMOND H. ALFONSO?

✔ ____
YES NO

5. Did the Defendant, LEVLEX ENTERPRISES, LTD., a New York Corporation, conspire to conceal property of RAYMOND H. ALFONSO to avoid the Plaintiffs as creditors of RAYMOND H. ALFONSO?

✔ ____
YES NO

6. Was the TransFlorida Bank Building fraudulently conveyed from Royal Rehab Corp. to Samuel Cantor Corp.

✔ ____
YES NO

7. Was the TransFlorida Bank Building fraudulently encumbered with the mortgage in favor of Levlex Enterprises, Ltd.?

✔ ____
YES NO

IF your answer is "NO" to questions 1 through 5 and you have answered questions 6 and 7, above, go no further. Sign and date the verdict form. If you answered "YES" to any of questions 1 through 5, above, then as a matter of law, 100 shares of ROYAL REHAB CORP., a Florida Corporation, and 2000 shares of ROYAL REHAB OF TEXAS, INC., a Texas Corporation, are the property of the Plaintiffs. Go on to question 8.

8. Has the value of the stock been mingled, damaged, or dissipated by the acts of the Defendants since the date of concealment?

✔ YES ____ NO

IF YOUR ANSWER TO question number 8 is "NO", then go no further and sign and date the verdict form.

IF YOUR ANSWER TO question number 8 is "YES", then go on to question number 9.

9. What is the dollar amount of the reduction in value of the stock as a result of the mingling, damage, or dissipation caused by the acts of the Defendants since the date of the concealment? If you cannot decide the dollar amount in reduction in value of the stock, do NOT answer this question and go to question number 10. $_____ (Do NOT fill in this space if you are unable to determine the dollar amount of the reduction of value of the stock).

10. What dollar amount will fairly compensate the Plaintiffs (answer this question ONLY if you did not answer question number 9).

$1,700,000 (Fill in this space ONLY if you did not answer question number 9).

SO SAY WE ALL this 20th day of August, 1992.

/s/ [Illegible]
Foreman/Forewoman

/s/ Robin Glenn Seitz

[Filed Aug. 26, 1992]

IN THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

---

Case No.: 90-37325 (16)

JUDGE: MORIARTY/MARKO

---

PAUL ELIE and EDGAR C. ELIE,
*Plaintiffs,*

-vs-

LEVELEX ENTERPRISES, LTD., a New York Corporation, CANTOR SAMUEL, INC., a Florida Corporation, ROYAL REHAB CORP., a Florida Corporation, MARVIN BROXMEYER, JUDITH BROXMEYER, his wife, citizens and residents of Florida, STEVEN R. BROWNSTEIN, and RAYMOND H. ALFONSO,
*Defendants.*

---

FINAL JUDGMENT

THIS CAUSE came before the Court for jury trial on the 17th, 18th, 19th, and 20th of August, 1992. The matters tried before the jury consisted of Plaintiffs' claims against all the Defendants for civil conspiracy to conceal the assets of co-Defendant, RAYMOND H. ALFONSO from Plaintiffs as Alfonso's creditors, and a cause of action to set aside a fraudulent conveyance and subsequent fraudulent encumbrance concerning real property in which Co-Defendant RAYMOND H. ALFONSO had a concealed interest. The Defendant, RAYMOND H.

ALFONSO failed to file any responsive pleading or paper in this Cause, and provisional remedies were separately granted to Plaintiffs in this matter concerning ALFONSO's property that was in the hands of the other co-Defendants. On August 20th, the jury after trial, and the close of the evidence, returned a verdict on special jury interrogatories, finding that MARVIN BROXMEYER, JUDITH BROXMEYER, ROYAL REHAB CORP., a Florida Corporation, CANTOR SAMUEL, INC., a Florida Corporation, and LEVLEX ENTERPRISES, LTD., a New York Corporation, conspired to conceal property of RAYMOND H. AFONSO to avoid the Plaintiffs as creditors of RAYMOND H. ALFONSO; and that the TransFlorida Bank Building, lying and situate in Broward County, Florida to-wit:

> Unit No.s 102, 103, 104, 201, 202, 203, 204, 205, and 301, TRANSFLORIDA BANK EXECUTIVE CENTRE, a Condominium, according to the Declaration of Condominium thereof, as recorded in O.R. Book 16735, at Page 0198, of the Public Records of Broward County, Florida.

was fraudulently conveyed from ROYAL REHAB CORP., a Florida Corporation as Grantor, to CANTOR SAMUEL, INC., a Florida Corporation as Grantee. Subsequently, CANTOR SAMUEL, INC., a Florida Corporation, fraudulently encumbered the TransFlorida Bank Building with a Mortgage in favor of LEVLEX ENTERPRISES, LTD., a New York Corporation. The evidence adduced at trial revealed that ROYAL REHAB CORP., CANTOR SAMUEL, INC., and LEVLEX ENTERPRISES, LTD., were corporations wholly owned and controlled by Defendants MARVIN and JUDITH BROXMEYER and RAYMOND H. ALFONSO. The jury then returned a verdict in general damages for $1,700,-000.00 (ONE MILLION SEVEN HUNDRED THOUSAND DOLLARS) in favor of the Plaintiffs, PAUL ELIE and EDGAR C. ELIE.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that Plaintiffs PAUL ELIE and EDGAR C. ELIE have and recover from the Defendants, and all of them, jointly and severally the sum of $1,700,000.00 (ONE MILLION SEVEN HUNDRED THOUSAND DOLLARS), which shall bear interest at the rate of 12% per year, for which sum let execution issue *FORTHWITH.*

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Plaintiffs PAUL ELIE and EDGAR C. ELIE have from the Defendants and recover from them a 20% interest in all of the stock in ROYAL REHAB CORP., a Florida Corporation, and ROYAL REHAB OF TEXAS, INC., a Texas Corporation which Defendants control.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the conveyance from ROYAL REHAB CORP., a Florida Corporation to CANTOR SAMUEL, INC., a Florida Corporation, transferring by Quitclaim Deed recorded at OR BOOK 16,933 at page 0361, of the official Public Records of Broward County, Florida, the TransFlorida Bank Building from ROYAL REHAB CORP. to CANTOR SAMUEL, INC. be and the same is hereby determined to be a fraudulent conveyance, and it is henceforth Ordered and Decreed that said conveyance *is* set aside, vacated, and declared NULL and VOID, and of no further effect or validity.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the encumbrance consisting of a second Mortgage from CANTOR SAMUEL, INC., as Mortgagor to LEVLEX ENTERPRISES, LTD., as Mortgagee, with the TransFlorida Bank Building being the security therefor, recorded at OR BOOK 17,974 at page 0818, of the Official Public Record of Broward County, Florida, be and the same *is* hereby determined to be a fraudulent encumbrance and it is henceforth Ordered and Decreed

that said encumbrance is set aside, vacated, and declared NULL and VOID, and of no further effect or validity.

The Court hereby reserves jurisdiction to award costs to the Plaintiffs as the prevailing parties in the lawsuit, and to do all things necessary to carry out the adjudications herein.

ALL WRITS and PROCESS necessary to effectuate the adjudications of this Final Judgment, including execution for all sums shall issue *FORTHWITH* and without delay.

DONE AND ORDERED this 26 day of August, 1992, in Chambers at Ft. Lauderdale, Broward County, Florida.

/s/ Paul Marko, III
HONORABLE PAUL MARKO, III
Circuit Court Judge

DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

---

Case No. 92-2900

Broward
L.T. Case No. 90-37325 (16)

MARVIN BROXMEYER and JUDITH BROXMEYER,
*Appellants/Cross-Appellees,*

v.

PAUL ELIE and EDGAR ELIE,
*Appellees/Cross-Appellants*

---

# MOTION FOR REHEARING AND/OR CLARIFICATION, MOTION FOR CERTIFICATION, AND MOTION TO STRIKE

(Motion to Stay Mandate Pending Review in Florida Supreme Court)

The Appellees/Cross-Appellants PAUL ELIE and EDGAR C. ELIE, by and through undersigned counsel, file this their Motion for Rehearing and/or Clarification, Motion For Certification, pursuant to Fla.R.App.P. 9.330(a), and Motion to Strike a portion of the Supplemental Record, and Motion to Stay Mandate Pending Review in the Florida Supreme Court and state as follows:

1. The Court has overlooked and misapprehended several critical points of law and fact, which require clarification and rehearing, as more fully set forth below.

2. In this Court's Opinion of November 16, 1994, the Court states that:

a. "There was no proof of damages".

b. "The Elies did not present any competent evidence to prove the value of Alfonso's stock at the time the stock was issued to Alfonso's mother in 1987, or at any time thereafter."

c. The Court states that the evidence, viewed in the light most favorable to the movants reflected that the Appellants (defendants below) "consented to Alfonso's stock being issued to Alfonso's mother, Ernestine Alfonso."

d. The Court states that "the essence" of the Elies complaint against the Broxmeyers was that because the Broxmeyers allowed Alfonso's stock to be titled in the name of Alfonso's mother, the Elies were unable to collect their judgments against Alfonso by levying on the stock.

e. The Court states that "the Elies counsel recognized his inability to establish the value of the stock, and persuaded the trial judge to submit two interrogatory verdicts on damages. . . ."

f. The Court states that "the only evidentiary basis in the record" which the Elies suggest will support the 1.7 million dollar judgment is that it "approximately corresponds" to the face amount of the judgments the Elies had against Alfonso. . . ."

g. The Court states that the Elies "notwithstanding their admitted inability to prove damages" rely on *Winn & Lovett v. Saffold Bros.*, 164 So. 681 (Fla.1936).

h. The Court states that the present case is distinguishable from *Winn & Lovett* because there was "no proof of the value of the property at the time of the alleged fraudulent transfer" or at any time thereafter.

i. The Court cites three cases from the Third District of Florida for the proposition that "the law furnishes a remedy only for such wrongful acts as result in *injury or damage.*" (emphasis supplied.) After citing these three

cases, the judgment is reversed with directions to enter judgment in favor of the Broxmeyers. This supports the position that the Appellate Court has determined, in this case, that the wrongful acts of the Broxmeyers *did not* result in injury or damage to the Elies.

3. The Opinion demonstrates that the Court has misapprehended the proofs at trial and the facts upon which the judgment is based, and the law as applied to the facts, which will be taken in order below.

4. In the alternative, Appellees require clarification of the Court's Opinion, because it is not clear what the Court is considering as the "lack" of competent evidence or "concession of counsel" as follows:

a. Is the Appellate Court finding that *no proof of damages or injury was presented*, or was the proof presented incompetent?

b. Is the Appellate Court saying that there was no competent evidence to prove the value of Alfonso's *stock* (as opposed to the value of the corporate assets) at *any time*, at the date of concealment, or the date of the judgments against Alfonso in 1990?

c. Is the Appellate Court stating that the evidence showed the stock *going to* Ernestine Alfonso (the mother), as opposed to being in the hands of the Broxmeyers?

d. Is the Appellate Court determining that, based on this record, Marvin and Judith Broxmeyer did *not* have possession of the stock, or, as co-conspirators would *not* be liable for concealment of the stock?

e. Is the Appellate Court basing its Opinion of the "concession" of counsel on the jury interrogatories which require the jury to determine the reduction in value of the stock *since* the date of concealment?

f. Is the Appellate Court requiring expert testimony to prove the precise value of stock or that stock in

a closely-held corporation with millions of dollars of assets has actual value?

5. None of these matters are made clear in the Opinion. Further, it is clear that the Elies were *injured*, because the Appellants are not even *appealing* the fraudulent conveyance and fraudulent encumbrance of the TransFlorida Bank Building, or the findings of fact by the trial judge, substantive parts of the Final Judgment on appeal. They merely contest how the damages were awarded in the Final Judgment. It is inconceivable that this Court could be holding that though there was wrongful conduct, it did not result in material injury or damages. If there was "no proof" of damages, which movants will show is incorrect, then this Court must provide for a retrial on damages, and *guidance* on what proofs are required. To state, in light of the evidence listed below, that "no proof of damages" was presented, not even a scintilla, sufficient to withstand directed verdict, is a gross misapprehension of the facts and misapplication of the law regarding conspiracy, fraudulent transfers and concealment of assets, and the damage caused thereby.

## I. PROOF OF DAMAGES

### A. *DOCUMENTARY EVIDENCE*

6. At trial, the Elies introduced *documentary evidence* regarding the value of the stock (e.g. 2000 shares of Royal Rehab of Texas, Inc. and 100 shares of Royal Rehab Corp., a Florida Corporation). The following documents prove that the stock either had *substantial value*, sufficient to put the issue of diminution or the issue of sufficient, remedial damages to the jury, or they establish with substantial mathematical precision (Plaintiff's Exhibits 5 and 8) the exact value of the time of concealment [1]:

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[1] It should be noted that if Broxmeyer had proved that the value of the stock *at trial* was two million dollars or more, then certainly

a. Plaintiff's Exhibit 1, the Minutes of Organization of Royal Rehab of Texas, Inc. at page 3, states that Raymond Alfonso shall have 20% of the stock "for the services performed by Raymond Alfonso to-date". The same document shows Mr. Broxmeyer approving of assignment of the stock to Ernestine Alfonso and "declared to be fully paid and non-assessable". In oral argument, the court used this to counter appellants' arguments that the stock was worthless (Oral Argument, p. 61 line 9 through p. 62, line 10). Appendix 3 hereof.

b. Plaintiff's Exhibit 3, the case of *In Re: Alfonso*, 94 B.R. 777 (Bankr. S.D. Fla. 1988), shows that Alfonso failed to list various assets, which would include his stock in the Royal Rehab Corporations or his interests titled in his mother's name within two years of bankruptcy (assets not listed in his bankruptcy schedules, Plaintiff's Exhibit 2).

c. Plaintiff's Exhibit 5, which was admitted over objection, *which objection was not pursued on appeal*, shows the Defendants' adoptive admission with regard to apartment units in Houston not listed in Exhibit 8 (see below for Plaintiff's Exhibit 8). Exhibit 5 contains newspaper articles which were held out by the Defendants as true, and in which the Defendants held themselves out and admitted to owning a joint-venture interest in seven apartment complexes totalling 2,464 units (see Appendix 1 attached). Even Marvin Broxmeyer conceded that these units were assets of the corporations but he testified they "were lost." See below for Marvin Broxmeyer's testimony.

d. Plaintiff's Exhibit 7, the joint financial statement of Marvin and Judith Broxmeyer shows a loan related to Royal Rehab Corp. for $235,000. It is

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the jury would have returned a verdict of zero dollars as to diminution and no damage award would have been returned.

unclear if this represents a loan from the corporation to Marvin and Judith, which would prove the corporation had money to loan, or whether it was a loan to Royal Rehab from Marvin and Judith, which would indicate that the corporation had cash on hand, but owed a liability to its insider-principals.

e. Plaintiff's Exhibit 8, Appendix 2 hereof, the "Real Estate Property Portfolio" (for Royal Rehab of Texas, Inc.) shows eight apartment buildings in Houston, *separate and apart* from the seven additional units listed for Plaintiff's Exhibit 5, and specifically gives dollar values for the units, the Royal Rehab ownership and the partners' equity. During Oral Argument before this Court on September, 13, 1994 (Appendix 3), Appellants' counsel *conceded* that Plaintiff's Exhibit 8 was used "[*i*]*n an effort to market this whole—this whole procedure of rehabilitating properties with other companies in Florida* . . . ." (Appendix 3 at page 19). This *proves* with specificity the value, in part, of the corporate assets at the time of concealment. (See also Plaintiff's Exhibit 5).

In Oral Argument, this Court said, in reference to Plaintiff's Exhibit 8, "That's clear that they [the defendants] were simply talking about *potential equities* (emphasis supplied) as opposed to . . . (Page 19, lines 4-6 of Appendix 3 hereof). Again, the Court is misapprehending the facts, and substituting its view of the facts. Exhibit 8 states that it is a "*Current* Real Estate Property Portfolio" listing "*Current* Asset Value." Where is it potential? This was held out to banks and brokers as a list of current, valued assets. At Oral Argument, Appellants' conceded "the document speaks for itself." (Appendix 3, page 19, lines 7-8). *It was admitted without objection.* In a closely held corporation, the net value of the assets *is in fact* the minimal value of the stock.

In addition, the Elies would further move to strike a portion of the submission by Appellants' counsel, supplementing the record on appeal. In preparing this motion for rehearing, counsel for Movants became aware for the first time, that counsel for Appellants had submitted *two* pages as "Plaintiff's Exhibit 8" in his supplement to the record (motion dated July 29, 1994). In fact, the second page produced by Appellants' counsel, identical to the first but with handwriting on it, was never brought up or considered at trial. See Clerk's List of Trial. Exhibits showing Exhibit 8 to be one page only (R 1308-1310).

f. Plaintiffs' Exhibit 11 specifically references Royal Rehab Corp. a Florida Corporation and Royal Rehab of Texas, Inc. a Texas Corporation and states that 20% of the corporations and investments shall belong to (Raymond) Alfonso. This *included* any *subsequently formed* corporations. Plaintiff's Exhibit 1, the minutes of organization for Royal Rehab of Texas, Inc. is the only document which refers to the titling of the stock in the name of Ernestine Alfonso (the mother). Nothing in the record makes any mention of the stock in Royal Rehab Corp., a Florida Corporation, or any of the subsequently formed joint-ventures or corporations. Plaintiffs' Exhibit 11 states that the two Royal Rehab corporations "have formed" and that (Raymond) Alfonso's 20% cost shall not exceed "$400.00" per corporation. As a result, there is at least minimal capitalization of the corporations (hence minimal value) even in March, 1987.

g. *Defendant's* Exhibit 5, the "ripped-up" stock certificate titled to Ernestine Alfonso, although not introduced until the Defendant's case-in-chief, proves that Ernestine Alfonso *never* had possession of the Royal Rehab Corp., a Florida corporation stock, and, in fact, the Broxmeyers had possession of it *at*

*all times.* This defense exhibit only pertains to Royal Rehab of Florida, and no stock certificate has *ever* been turned over regarding Royal Rehab of Texas, Inc.

7. In addition to the *documentary evidence* listed above, there was *considerable and conflicting* testimonial evidence which also tended to prove the value of the stock. Before getting to that evidence, Movants wish to stress with great emphasis, Plaintiffs' Exhibits 8 and 5, which were both admitted, either *without objection*, or whose admission was not questioned on appeal. Those two exhibits show a total of 15 apartment complexes (not including warehouse and office building properties), with over 3,900 units, at least 1,463 of which have a calculated equity of $2,991,500 (Plaintiff's Exhibit 8). This constitutes hard and fast, absolute, positive, substantial, competent evidence as to the value of the stock after it was "titled" to Alfonso's mother in 1987, and at the time of its concealment in 1988. *It is also evidence of the Appellants' then-state-of-mind in their beliefs and estimations of the value of those properties in September, October 1988.*

8. Although it may have been preferable for an expert witness to opine that when a closely-held corporation owns millions of dollars worth of assets, the stock in the corporation has value, or for that expert to place an exact dollar amount value on the stock as a result of the ownership of the assets, *no Florida cases* have stated that an expert witness is a *necessity* for the proof of damages. Quite to the contrary, in a closely-held corporation, often it is the stockholders and officers who are in essence the "owners" of the corporation and its property, who can best determine and estimate the value of the corporation and its stock. *Mercury Marine Division of Brunswick Corporation v. Boat Town U.S.A., Inc.*, 444 So. 2d 88 (Fla. 4th DCA 1984).

9. Plaintiff's Exhibits 5 and 8 are competent to show what Appellants believed, and held out to be, their equity and the net worth of the property, hence stock, at the time of concealment. The jury was entitled to weigh that evidence against the Appellants testimony that the stock, at the time of trial, was worthless, and to disbelieve any testimony that the stock was worthless at the time Plaintiff's Exhibits 5 and 8 were created, or that the properties had been "lost" without any profits. In fact, this court is in the remarkable position of being able to use 20/20 hindsight to *know* that Marvin *lied* about at least one of the properties. At trial, he testified that Pecan Park was "lost." On the record in a related appeal (as pointed out in Appellees answer brief and at Oral Argument), it was shown that he kept a $100,000 mortgage interest that property.

10. Furthermore, as a matter of law, corporate stock has inherent value, even if only par or nominal value, and therefore is subject to the claims of a bankrupt's creditors or his creditors in execution. *Luskin v. Luskin*, 616 So. 2d 556 (Fla. 4th DCA 1993), at page 557.

B. *TESTIMONIAL EVIDENCE*

11. In addition to the documentary evidence listed above, the Elies solicited testimonial evidence from a number of witnesses which would establish the value of the stock. The testimonial evidence included:

a. Steven Brownstein, who testified that he took 10% of the stock in Royal Rehab Corp., a Florida corporation, in exchange for his legal fees. (R 43, lines 9-20). He also testified that the Broxmeyers were worried about Ray Alfonso's creditors coming after the stock in the corporation. (R 60 and 62). At one point, Brownstein testified that he tried to sell his 10% interest in the shares of Royal Rehab Corp., a Florida corporation, for $15,000.00, but he had no takers. Although he was unsuccessful in sell-

ing his stock for that amount, it is sufficient proof to show that he believed the stock to have value, which would preclude a directed verdict based on lack of proof of value of the Royal Rehab Corp. stock. He also testified that he was aware of at least ten other properties not listed on Plaintiff's Exhibit 8, which corresponds with the seven properties listed in Exhibit 5 (Royal Rehab of Texas, Inc. properties).

b. Paul Woodell testified that he prepared Plaintiff's Exhibit 8 on Marvin Broxmeyer and Raymond Alfonso's instructions and obtained the information on Exhibit 8 from Marvin. It was later shown to banks, though not left with the bankers (R 121-123). Exhibit 8 was admitted *without objection.* Paul Woodell also testified that Marvin Broxmeyer handed out Exhibit 5 to brokers, representing that it was *true and correct.* (R 205, line 7 through 206, line 4). Not only was this testimony competent and substantial, it was unobjected to and was not questioned on appeal.

c. James McGovern testified that he inspected the TransFlorida Bank Building in Plantation, Florida, and was made to understand *by the Broxmeyers* and Alfonso that it was owned by a Royal Rehab company, and that Raymond Alfonso owned 20%. (R 226, line 12 through 227, line 21).

d. Martin Steinhardt testified that Marvin told him that Ray Alfonso owned 20% of Royal Rehab Corp. which owned the building in Plantation, Florida. (R 256, line 20 through 262, line 13).

e. Finally, and most significantly, Marvin Broxmeyer himself testified that Ray Alfonso had a 20% interest in both Royal Rehab of Texas, Inc. and Royal Rehab Corp., a Florida corporation, and *the associated corporations* that were involved in the

Texas apartments. (R 329, lines 23 through 330, line 3). Marvin admits that he gave Paul Woodell the information on Exhibit 8. (R 336, line 9 through 337, line 5). This is an admission by the actual Defendant that he gave information to the person who prepared Exhibit 8 regarding the value of the properties, which in turn represented the value of the stock. Marvin *admitted* that Exhibit 5 was accurate (R 453) and he further *admitted* that the properties *had value* in September/October 1988, (R 351-352). There was *no documentary evidence* to support his testimony that the properties were lost (R 519-21). But in any event, this created a *conflict* in the evidence, which was then *properly* submitted to the jury.

12. The testimonial evidence was overwhelming that the assets of the corporations had *actual value*. For this Court to assert that there was no proof adduced by the Elies as to the value of the stock, is to make the statement that when proof of valuable assets in the millions of dollars is shown, that further testimony, either expert or otherwise, is necessary for a jury to determine that the stock in the closely-held corporations which own those assets has value. This has never been a requirement under Florida law, and no cases can be demonstrated which require it. It could be grounds for cross-examination, final argument, or the Defendants could have put on their own expert testimony regarding the value of the stock. In fact, Marvin Broxmeyer testified that the stock had *become worthless*, which the jury could have accepted. More on the jury verdict below.

## II. CONCESSIONS OF COUNSEL

13. The court stated that "Elies counsel recognized his inability to establish the value of the stock, and persuaded the trial judge to submit two interrogatory verdicts on damages. . .". The Opinion lists the two questions, 9 and 10. Question number 9 clearly and spe-

cifically asks the jury to determine the reduction in value of the stock "caused by the acts of the defendants *since the date of concealment.*" In other words, the Elies' counsel never conceded an inability to establish the value of the stock *at the time of concealment.* Rather, just as in *Winn & Lovett,* the problem was in establishing the value of the asset *after concealment.*

14. This court says that "not withstanding their admitted inability to prove damage, the Elies' rely on *Winn & Lovett. . .*". The Court then attempts to distinguish this case from *Winn & Lovett,* stating that "in the present case there was no proof of the value of the property *at the time of the alleged fraudulent transfer.*" (Emphasis supplied).

15. Ironically, at Oral Argument, Appendix 3, the court said:

> How does proof of something that happened in '86 or in '88, how does that prove your damages? (Page 33, line 24 through page 34, line 2)
>
> * * *
>
> I am not sure Houdini could have ever proved your case but . . . you have got to prove that in 1990 because you couldn't do anything until 1990, that this twenty percent, you know, damaged you . . . (Oral Argument, Appendix 3, Page 37, line 5 through 13).

16. So, despite asking about proof of value in 1990, at oral argument, in the Opinion issued on November 16th 1994, the court receded from the question at oral argument and stated that there was no proof of value of the property at the time of the fraudulent transfer. The Court said that the Elies did not present any competent evidence to prove the value of the stock at the time it was issued in 1987, *or at any time thereafter.* The Court is misapprehending the facts adduced at trial. Clearly,

Exhibit 8 and Exhibit 5, establish the value of the stock at the time of *concealment*. In *Winn & Lovett* the sequence of events went like this:

a. November, 1930 Bailey Produce secretly conveyed property to Winn & Lovett.

b. April 11, 1931 Saffold Bros. obtains judgment against Bailey Produce.

c. Subsequent to the April 11, 1931 judgment against Bailey Produce, a Creditor's Bill against Winn & Lovett for fraudulent transfer was commenced.

17. The fact-finder determined that the conveyances were fraudulent, to place the assets beyond the reach of Saffold Bros. The fact-finder further determined "that the property so removed has either been sold, dissipated, so mingled with defendant's property or so damaged that it is impracticable, if not impossible, to reach the same by process. . . . *Id.*, at 682-683.

18. The court then determined the value of the property on the date of the fraudulent transfer, November 1, 1930, well before the date of the final judgment against Bailey Produce. In the instant case, although judgments were not entered until 1990, the Elies' cases were commenced in 1985 and 1988 respectively. See Plaintiff's Exhibits 19, 20 and 21 (showing case number). The jury determined that the Broxmeyers had *conspired* to conceal Alfonso's assets from the Elies. The jury then determined that the concealed assets had been so dissipated that they could not determine their value.

19. As a result, the only concessions or admissions by counsel for the Elies as to the inability to prove the value of the assets is *after the date of concealment*, when the actions of the Appellants had so damaged, dissipated or commingled the property that its value *was completely impaired*. The interrogatory questions on the

verdict (which should include question number 8 omitted from the Court's Opinion) are all *specifically designed* to elicit from the jury, first, whether the property had been damaged, dissipated or mingled *after the date of concealment* (question number 8), e.g. *impairment of value,* and second, if damaged or dissipated, in what amount? (question number 9). There is *nothing* in the record or at Oral Argument where counsel conceded an inability to prove value *at the time of concealment.*

20. This Court recognizes that under *Winn & Lovett,* a judgment for money damages can be entered against the Appellants, but is apparently insisting either that the proof of the value of the fraudulently transferred property be demonstrated at some time *after* the fraudulent conveyance/concealment, or that the exhibits and testimony admitted at trial and *unchallenged* on appeal, are not "competent" evidence. It is on these points that rehearing or clarification is sought, because the Court is either misapprehending the factual evidence, substituting its own view of the evidence, or misapplying the law. Appellees could not have proved the value of the stock *after* concealment, and are not required to do so under *Winn & Lovett.* Where Appellants' wrong has caused the difficulty of proof of damage, they cannot complain of the resulting uncertainty. *Miller v. Allstate Insurance Company,* 573 So. 2d 24 (Fla. 3rd DCA 1990), page 28, see also fn. 4.

21. The Court in *Winn & Lovett* only entered a judgment for the *value* of the property conveyed *on the date of the fraudulent conveyance,* which was less than the total judgment held by Saffold Bros. In this case, the Court suggests that "the only evidentiary basis" for the money judgment is that it "approximately corresponds" to the face amount of the judgments against Alfonso. If, in fact, the evidence at trial proved (as it did) that the value of the transferred property on the date of concealment *exceeded* the total amount of the Alfonso judgments,

then the jury would be completely correct in its determination of the money damages. As the Elies took great pains to point out on pages 37 through 39 of their Answer Brief, the evidence introduced at trial (Exhibits 5 and 8), calculating Alfonso's 20% interest, could have supported a jury verdict as high as $6,750,000.00. Accordingly, the jury did exactly what it was supposed to do.

## III. APPLICABLE LAW

22. Plaintiff's Exhibits 5 and 8, either admitted without objection, or the admission thereof going unchallenged on appeal, are adoptive admissions by the parties-opponent and also go to their then-state-of-mind. *Hunt v. Seaboard Coastline Railroad Company,* 327 So. 2d 193 (Fla.1976); *Woodworth v. Woodworth,* 385 So. 2d 1024 (Fla. 4th DCA 1980); §§ 90.803(18)(b) and 90.803(18)(d), *Florida Statutes* (1992). Relevant evidence is evidence tending to prove or disprove a material fact. § 90.401, *Florida Statutes* (1992). All relevant evidence is admissible, except as provided by law. § 90.402, *Florida Statutes* (1992). Evidence which has a tendency to establish a fact in controversy is relevant. *Zabner v. Howard Johnson's, Inc.,* 227 So.2d 543 (Fla. 4th DCA 1969). By Alfonso and the Broxmeyers adopting the truth of the matters asserted therein, in holding Plaintiff's Exhibits 5 and 8 out as true, the evidence established itself as relevant, *competent,* and *substantive evidence*; *Mercury Marine Division,* supra. See also *Whigham v. Muehl,* 500 So.2d 1374, 1378 (Fla. 1st DCA 1987) and cases cited therein (corporate officers are charged with knowledge of corporate conduct and affairs). *Silvia v. Cumberland Farms, Inc.,* 588 So. 2d 1069 (Fla. 4th DCA 1991).

23. This Court has misapprehended Plaintiff's Exhibits 5, 8, and the testimonies of Woodell, Wing and Brownstein. These are substantive evidence, adopted by Appellants, which tended to prove facts in dispute, and constituted the Appellants' *own evaluation* of value of the

stock, e.g. "equity" as of September, October 1988 (R 453). *Hunt*; *Woodworth*, supra.

24. Plaintiff's Exhibit 8 squarely places the time frame of the date of concealment to be September, October 1988, and along with Exhibit 5, establishes a basis for damages, and ultimately a basis for calculation of damages. *Winn & Lovett*, supra.

25. This Court either advances the proposition that Plaintiff's Trial Exhibits 5 and 8 are not competent evidence of damages, or the Court has simply disregarded them.

26. There can be no question here as to the conflictive nature of the evidence elicited both in the Plaintiffs' and Defendants' cases-in-chief. The record is complete. The jury had an opportunity to *weigh* the credibility of Plaintiff's Exhibits 8 and 5, and the testimony of the witnesses against the testimony of Brownstein and Broxmeyer, and determine which evidence they would believe or disbelieve. It is not this Court's function to re-weigh the evidence or determine its admissibility *if that admissibility is not challenged on appeal*. Nor is it this Court's function to substitute its view of the evidence for that of the trier of fact and the trial judge below.

27. In *Macrellis v. George*, 202 So. 2d 107 (Fla. 4th DCA 1967), this court *held*:

> Reviewing the testimony in the case sub judice conclusively establishes *the evidence was conflicting* as to the right of possession. *It is not the function of a trial court or an appellate court to substitute its judgment for that of the jury on disputed questions of fact*. As was once said by the late Justice Terrell, "In our view the composite determination of a jury of laymen in a matter of this kind is the most satisfactory method the wit of men has ever devised for ferreting out the truth of such controversies. They are keen analysis of evidence. They are not sub-

> sumed by the quibbles and window-dressing of procedure. They are actuated rather by a sense of justice and fairness and when let alone will invariably arrive at a righteous result."
>
> Accordingly, the plaintiff's case was not essentially devoid of probative evidence, and we determine there was substantial competent evidence to support the verdict and the trial court erred in upsetting the verdict and *unlawfully encroached upon the jury's exclusive function as the trier of facts. . . .*" *Id.* at 108, 109. (emphasis supplied.)

28. The Florida Supreme Court has *held* that no appellate court shall disturb a jury verdict, unless the evidence advanced is found to be *improbable. Westerman v. Shell's City, Inc.*, 265 So. 2d 43 (Fla.1972). Plaintiff's Exhibit 8 was admitted *without objection.* It was not "improbable" because it was true, as an adoptive admission of the Appellants. *Woodward; Hunt*, supra, and as ordinary substantive evidence, and was probative evidence of an evaluation of *value* in September, October 1988 by the Appellants. *Mercury Marine Division; Whigham v. Muehl*, supra.

29. An appellate court has no business substituting its judgment for the jury whose function it is to determine damages. *Helman v. Seaboard Coast Line Railroad Co.*, 349 So. 2d 1187 (Fla.1977); *Odoms v. Traveler's Insurance Co.*, 339 So. 2d 196 (Fla.1976); *Miller v. Affleck*, 632 So. 2d 79 (Fla. 1st DCA 1993).

30. At trial, the Appellants, mainly through the testimony of Marvin Broxmeyer, tried to "explain away" (i.e. dispute) Plaintiff's Exhibits 5 and 8. It was strictly within the province of the jury to determine what evidence they believed, what evidence they disbelieved, draw all of the inferences permissible therefrom, and to make their decision *based solely on the evidence in the record.*

31. This Court is simply not permitted to substitute its view of the trial evidence, ignore crucial evidence of

damages which was introduced by the Plaintiffs, *without objection,* heard, weighed and considered by the jury, and impose its verdict over that of the jury and the trial judge. *Westerman; Helman; Odoms; Affleck,* supra.

32. Appellees note that the Opinion, Appendix 5, points out at page 1 thereof, the Appellees held judgments against Alfonso *in excess* of $2,000,000.00. The verdict returned by the jury was for $1,700,000.00. Thus, the jury did not return an excessive verdict based on the evidence adduced at trial, nor were they merely approximating the Alfonso judgments. Contrary to the Court's Opinion, the Elies did *not* suggest the 1.7 million dollar amount to the jury. In their briefs, the Elies "suggested" that the jury arrived at that amount for good reasons based on the evidence of damages set forth at trial. The jury was careful to *limit* damages to an amount they found reasonable based on the evidence.

33. In *Saffold Bros. Produce Co. v. Winn & Lovett Grocery Co.,* 149 So. 1 at page 2 (Fla.1933), the predecessor case to the case relied on by the Elies and *the trial court* for the jury instructions, the Florida Supreme Court *held*:

> The bill was framed upon the theory that it is not permissible in law for a person *or a combination of persons* to use the *fiction of a corporate entity for the promotion of fraudulent schemes to avoid personal liability for obligations incurred* . . . . That in such cases, the corporate entity, a formal fiction in law, is a fiction in reality, the mere alter ego of the designing traders to whom chancery will look through the veil of the corporate fiction and place the responsibility where in conscience and in law it belongs.

*Saffold Bros. v. Winn & Lovett,* supra also holds the proposition that it is not proper nor within the power of the Court (on appellate review) to substitute its judg-

ment for that of the fact finder. *Westerman*, supra., *Winn & Lovett v. Saffold Bros.*, supra.

34. The law requires only that fraud, including damages for fraud, be proved by the preponderance of the evidence. *Rigot v. Bucci*, 245 So.2d 51 (Fla.1971); *Reef Buick, Inc. v. Elliott*, 477 So.2d 1035 (Fla. 4th DCA 1985). The legal effect of the fraud conspiracy perpetrated on the Elies was to damage their interests, e.g. the Royal Rehab of Texas, Inc. stock and Royal Rehab Corp. stock, and to fraudulently convey the Trans-Florida Bank Building, and then fraudulently encumber it in *furtherance* of the Broxmeyers' and Alfonso's conspiracy. These actions were all to the detriment, *harm and damage* of the Elies. Each element of damages was proved at trial: (1) stock in various corporations either disclosed or not had an ascertainable value at the time of concealment, that stock was concealed, mingled, and its value dissipated by the actions of the Broxmeyers; (2) Elies were hindered, delayed *and defeated* as creditors of Alfonso by the actions of the Broxmeyers; (3) Real property was *fraudulently* conveyed and then *fraudulently* encumbered between corporations solely owned and controlled by the Broxmeyers and Alfonso, as part of their conspiracy.

35. How can a directed verdict be granted when the Appellants do not even contest on appeal the fraudulent conveyance and encumbrance, or their ownership and control of the corporations used to commit that fraud and conspiracy?

36. The judgment from the trial court comes to the Appellate Court clothed with the presumption of correctness. *Young v. Department of Community Affairs*, 625 So. 2d 831 (Fla.1993); *Hewitt v. State*, 575 So. 2d 273 (Fla. 4th DCA 1991).

37. This Court's Opinion ("Houdini couldn't have proved this case") seems to suggest that under this Court's

view of the evidence below, there is an impossible burden for the plaintiffs to meet. On the contrary, the judgment is presumed correct, and the Appellants must show *clear, reversible* error. The Appellants did not even bother to appeal the fraudulent conveyance and fraudulent encumbrance aspect of the judgment, which stands. The only aspect of the final judgment which was appealed, was the element of conspiracy, and the money damages award as a result thereof. How can this Court direct a verdict in favor of the Broxmeyers, when they have not even appealed that portion of the final judgment determining that they owned and controlled the corporate defendants who *fraudulently* conveyed and then *fraudulently* encumbered property in which Alfonso had an interest? How can that non-appealed part of the final judgment fail to establish either damages or injury, at least beyond the point of directed verdict?

38. If this Court's concern is with the quantum of proof of damages at trial, or the mathematical precision with which that proof is applied, then that should result in a remand for new trial on damages, with instructions on the quantum and precision needed. It cannot be the basis, under the circumstances of this case and final judgment, for a directed verdict. See, i.e., *Onontario of Florida, Inc. v. R.P. Trucking Co., Inc.*, 399 So. 2d 1117 (Fla. 4th DCA 1981); *Muroff v. Dill*, 386 So. 2d 1281 (Fla. 4th DCA 1980), *rev. denied*, 392 So. 2d 1377 (Fla. 1981); *Diversified Commercial Developers, Inc. v. Formrite*, 450 So. 2d 533 (Fla. 4th DCA 1984).

39. The jury determined that the Broxmeyers had conspired to conceal the assets of the Elies' judgment-debtor, Alfonso. Therefore, they are co-conspirators, who are jointly liable for the acts of their co-conspirators. *Nicholson v. Kellin*, 481 So. 2d 931, 935 (Fla. 5th DCA 1986); *Donoforio v. Matassini*, 503 So. 2d 1278. 1281 (Fla. 2nd DCA 1987). As a result, the Elies would be entitled to *at least* nominal damages for the conspiracy, if

not actual damages. See i.e., *Dalton v. Meister,* 329 N.W.2d 9 (Wis. 1976), cited in 11 ALR4th 332. See also cases cited therein. The Florida Uniform Fraudulent Transfer Act ("FUFTA") effective January 1, 1988 (e.g. *prior* to date of concealment being September, October 1988-R 556-557) is prospective in its application. *Snellgrove v. Fogazzi,* 616 So.2d 527 (Fla. 4th DCA 1993). FUFTA provides for entry of money damages. §§ 726.109(2) and (3). Under the law of conspiracy, the plaintiff need only "[s]how some peculiar power of coercion possessed by the conspirators by virtue of their combination, which power an individual would not possess, then conspiracy itself becomes an independent tort." *Churruca v. Miami Jai-Alai, Inc.,* 353 So. 2d 547, 550 (Fla.1977), reaffirming *Snipes v. West Flagler Kennell Club, Inc.,* 105 So.2d 164 (Fla.1958). Alfonso could neither have *independently* titled the stock in his mother's name, nor fradulently transferred and encumbered the TransFlorida Bank Building without the Broxmeyers' and their corporations' assistance. The Appellants chose instead to divert the title of the various stocks into the name of Alfonso's mother (although she never actually had possession), and then to use the various corporations in a scheme to mislead and defraud the Elies as Alfonso's creditors. *Saffold Bros. v. Winn & Lovett,* supra.

40. Finally, this Court has not rendered any opinion disposing of the Appellees' cross-appeal regarding civil theft and punitive damages. Based on the finding of conspiracy and intentional tort, the Elies would be entitled to at least nominal damages (see above), and an instruction on punitive damages. Further, the Court has not disposed of any of the pending motions made after Oral Argument regarding mootness, contempt, and the res judicata effect of the Bankruptcy Court's rulings. See, for example, counsel for Judith Broxmeyer's admission that the Bankruptcy Court ruling would *moot this appeal*

(Appendix 4—being Judith Broxmeyer's Objection and Order overruling objection).

41. Movants incorporate by reference their Motion for Certification contained in their Motion for Rehearing En Banc and to Certify Questions as Matters of Great Public Importance filed contemporaneously with this motion, and accordingly incorporate by reference their certificate of counsel contained in the Motion for Rehearing En Banc to Certify Questions as Matters of Great Public Importance.

## IV.—CONCLUSION

42. Movants respectfully request this Court to rehear this matter, clarify the points set forth in Paragraph 5 above, strike the second page of the supplemented record regarding Plaintiff's Exhibit 8, vacate the Opinion of November 16, 1994 (Appendix 5 hereof), affirm the judgment below on the facts, or in the alternative certify to the Florida Supreme Court as questions of great public importance, the questions framed in the Incorporated Motion for Rehearing En Banc and to Certify Questions as Matters of Great Public Importance, and stay this Court's Mandate pending review before the Supreme Court of Florida.

WHEREFORE, the Movants pray that this Court grant the relief requested above.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

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Case No. 92-02900

L.T. Case No. 90-37325 16 Broward

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MARVIN BROXMEYER, JUDITH BROXMEYER, *et al.*,
*Appellant-Cross Appellee(s),*

vs.

PAUL ELIE, EDGAR C. ELIE, *et al.*,
*Appellee-Cross Appellant(s).*

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December 28, 1994

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ORDERED that appellees/cross-appellants' motion filed December 1, 1994, for rehearing and/or clarification, motion for certification, motion to strike, and motion to stay mandate pending review in Florida Supreme Court is hereby denied; further,

ORDERED that appellees/cross-appellants' motion filed December 1, 1994, for rehearing en banc and to certify questions as matters of great public importance is hereby denied.

IN THE DISTRICT COURT OF APPEAL
STATE OF FLORIDA, FOURTH DISTRICT

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Case No: 92-02900

PAUL ELIE and EDGAR C. ELIE,
*Plaintiffs/Petitioners,*

vs.

MARVIN BROXMEYER, JUDITH BROXMEYER, LEVLEX ENTERPRISES, LTD., ROYAL REHAB CORP., CANTON SAMUEL, INC., STEVEN R. BROWNSTEIN and RAYMOND H. ALFONSO,
*Defendants/Respondents.*

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## NOTICE TO INVOKE DISCRETIONARY JURISDICTION

Notice is given that Paul Elie and Edgar C. Elie, plaintiffs/petitioners, invoke the discretionary jurisdiction of the Supreme Court to review the decision of this court dated November 16, 1994 and rendered by and order denying rehearing filed on December 28, 1994. The decision expressly and directly conflicts with a decision of another district court of appeal or of the supreme court on the same question of law. A copy of the decision and order denying rehearing are attached.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, this 24th day of January, 1995, to Eliot R. Weitzman, Weintraub, Weintraub, Seiden & Orshan, 2250 S.W. Third Avenue, Miami, FL 33139, to Randall L. Leshin, 1921 E. Atlantic Boulevard, Pompano Beach, FL 33062, and to

Stephen P. Lange, Esq., 7 S.E. 13th Street, Ft. Lauderdale, FL 33316.

Respectfully submitted,

MARJORIE GADARIAN GRAHAM
MARJORIE GADARIAN GRAHAM, P.A.
Oakpark, Suite D 129
11211 Prosperity Farms Road
Palm Beach Gardens, FL 34410
(407) 775-1204

By: /s/ Marjorie Gadarian Graham
MARJORIE GADARIAN GRAHAM
Florida Bar No. 142053

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT
JULY TERM 1994

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Case No. 92-2900

L.T. Case No. 90-37325 (16)

MARVIN BROXMEYER, JUDITH BROXMEYER, LEVLEX ENTERPRISES, LTD., ROYAL REHAB CORP. and CANTOR SAMUEL, INC.,

*Appellants/Cross-Appellees,*

v.

PAUL ELIE, EDGAR C. ELIE, STEVEN R. BROWNSTEIN and RAYMOND H. ALFONSO,

*Appellees/Cross-Appellants.*

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Opinion filed November 16, 1994

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Appeal from the Circuit Court for Broward County
Paul Marko, Judge.

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KLEIN, J.

The Broxmeyers appeal a judgment entered against them based on conspiracy, arguing that there was no conspiracy, and that the Elies did not prove any damages in any event. We agree that there was no proof of damages, so we need not decide if there was a conspiracy.

The Elies obtained judgments against Raymond Alfonso totalling $2,008,694 in 1990. Because they were

unable to collect their judgments against Alfonso, the Elies brought this action against the Broxmeyers. They alleged that the Broxmeyers participated in a conspiracy which made Alfonso judgment-proof, and thus made it impossible for the Elies to collect their judgments against Alfonso.

The facts underlying the alleged conduct against the Broxmeyers involved a corporation owned by the Broxmeyers and Alfonso which engaged in real estate transactions. The corporation was formed in Texas in April of 1987, with Mr. Broxmeyer owning 80% of the stock and Alfonso owning 20%. Viewed in a light most favorable to the Elies, the evidence reflected that Alfonso did not want his stock in his own name because of various creditors who were hounding him, that the Broxmeyers knew this, and that the Broxmeyer's consented to Alfonso's stock being issued to Alfonso's mother, Ernestine Alfonso. The corporation acquired, rehabilitated, and disposed of properties in Texas from 1987 through 1989.

The essence of the Elies' complaint against the Broxmeyers was that because the Broxmeyers allowed Alfonso's stock to be issued to Alfonso's mother, the Elies were unable to collect their 1990 judgments against Alfonso by levying on the stock.

At trial, the Elies did not present any competent evidence to prove the value of Alfonso's stock at the time the stock was issued to Alfonso's mother in 1987, or at any time thereafter. The Elies' counsel recognized his inability to establish the value of the stock, and persuaded the trial judge to submit two interrogatory verdicts on damages to the jury which were as follows:

> 9. What is the dollar amount of the reduction in value of the stock as a result of the mingling, damage or dissipation caused by the acts of the Defendants since the date of the concealment? If you cannot decide the dollar amount in reduction in value of

> the stock, do NOT answer this question and go to question number 10. $———— (Do NOT fill in this space if you are unable to determine the dollar amount of the reduction in value of the stock).
>
> 10. What dollar amount will fairly compensate the Plaintiffs (answer this question ONLY if you did not answer question number 9). $———— (fill in this space ONLY if you did not answer question number 9).

The jury did not answer interrogatory number 9, but did answer interrogatory number 10 and awarded damages of $1,700,000. The only evidentiary basis in the record which the Elies suggest will support this amount is that it approximately corresponds to the face amount of the judgments the Elies had against Alfonso, excluding attorneys' fees and costs. The obvious problem with that argument is that the amount of the Elies' judgments against Alfonso would have no bearing on how much damage was caused by the alleged fraudulent transfer, except to put a limit on the amount the Elies could recover from the Broxmeyers.

As support for their argument that they can recover, notwithstanding their admitted inability to prove damages, the Elies rely on *Winn & Lovett Grocery Co. v. Saffold Bros. Produce Co.*, 164 So. 681 (Fla. 1935). In *Winn & Lovett* a fraudulent transferee had dissipated the property, so that the creditor of the fraudulent transferor could not establish the value of the property at a relevant time after the fraudulent transfer. The court held that under those circumstances judgment may be entered against the transferee for the value of the property at the time the transferee took physical possession of the property. The present case is distingiushable from *Winn & Lovett* because in the present case there was no proof of the value of the property at the time of the alleged fraudulent transfer.

We need not decide whether the other elements of conspiracy were established, since "the law furnishs a remedy

only for such wrongful acts as result in injury or damage." *Scott-Stephen Develop. Corp. v. Gables By The Sea, Inc.*, 167 So. 2d 763 (Fla. 3d DCA 1964). Where there is no proof of damages, there can be no recovery. *Ryan v. Atlantic Fertilizer & Chemical Co.*, 515 So. 2d 324 (Fla. 3d DCA 1987) and *All Florida Surety Co. v. Vann*, 128 So. 2d 768 (Fla. 3d DCA 1961).

We therefore reverse the denial of the Broxmeyers' motion for directed verdict and remand for judgment to be entered in their favor.

HERSHEY and STONE, JJ., concur.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

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Case No. 92-02900

L.T. Case No. 90-37325 16 Broward

MARVIN BROXMEYER, JUDITH BROXMEYER, *et al.*,
*Appellant-Cross Appellee(s),*

vs.

PAUL ELIE, EDGAR C. ELIE, *et al.*,
*Appellee-Cross Appellant(s).*

---

December 28, 1994

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ORDERED that appellees/cross-appellants' motion filed December 1, 1994, for rehearing and/or clarification, motion for certification, motion to strike, and motion to stay mandate pending review in Florida Supreme Court is hereby denied; further,

ORDERED that appellees/cross-appellants' motion filed December 1, 1994, for rehearing en banc and to certify questions as matters of great public importance is hereby denied.

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

---

Case No. 92-2900

L.T. Case No. 90-37325 (16)

MARVIN BROXMEYER, JUDITH BROXMEYER, *et al*,
*Appellants*

v.

PAUL ELIE, EDGAR ELIE, *et al*,
*Appellees*

---

MOTION TO STAY APPELLANTS MARVIN BROXMEYER AND JUDITH BROXMEYER'S APPEALS AS WELL AS OTHER APPELLANTS AND FOR STAY ON APPELLEES' CROSS-APPEAL AND/OR TO STRIKE APPELLANTS' INITIAL BRIEFS AS BEING VOID AND IN VIOLATION OF 11 U.S.C. § 362(a) AUTOMATIC STAY PROVISIONS

APPELLEES, Paul Elie and Edgar C. Elie, by and through undersigned counsel, file this, their Motion to Stay Appellants, MARVIN BROXMEYER and JUDITH BROXMEYER's Appeals As Well As Other Appellants and for Stay on Appellees' Cross-Appeal And/Or To Strike Appellants' Initial Briefs as Being Void and in Violation of 11 U.S.C. § 362(a) Automatic Stay Provisions and state:

1. Both Marvin Broxmeyer and Judith Broxmeyer have continued their appeals in this Court, despite both of them filing separate bankruptcy cases, and *without* seeking stay relief from the automatic stay in the Bankruptcy Court to *lift* the automatic stay and prosecute *this* appeal. 11 U.S.C. § 362(a).

2. An appeal is a continuation of the proceedings below specifically because the same matters being litigated between the same parties have not yet come to a full and complete judicial rest and no further judicial labor can be done on the case. *Farley v. Henson*, No.s 91-1620 and 91-1621, *Slip Op.* (8th Cir. August 6, 1993) attached hereto; *Ellison v. Northwest Engineering Co.*, 707 F.2d 1310 (11th Cir. 1983).

3. 11 U.S.C. § 362(a) provides that:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—
>
> (1) the commencement *or continuation*, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced *before* the commencement of the case under this title, or to recover a claim against the debtor that arose *before* the commencement of the case under this title[.] (emphasis supplied). See *Farley*, supra, attached hereto.

4. Marvin Broxmeyer filed a *voluntary*, no-asset Chapter 7 Bankruptcy in the Southern District of New York on April 1, 1993, which case was subsequently transferred to the Southern District of Florida, Case No. 93-12447-BKC-AJC.

5. Judith Broxmeyer filed a *voluntary*, no-asset Chapter 7 Bankruptcy in the Southern District of Florida on April 12, 1993, Case No. 93-11453-BKC-AJC.

6. Both Appellants and Appellees noticed their respective appeals and cross-appeal pre-petition, on or about October 2, 1992 and October 12, 1992.

7. Appellees have sought stay relief in Marvin Broxmeyer's Bankruptcy case, which that Debtor opposes, and

will be the subject of an adversary proceeding and trial which is not yet scheduled. See Exhibit "A"; Fed.R. Bankr.P. 9014; R. 7001, *et seq.*

8. Appellees have sought stay relief in Judith Broxmeyer's Bankruptcy case with respect to certain assets in which she claimed an ownership interest, and to hold her in contempt below, which stay relief was granted, but on August 24, 1993 the stay relief was suspended in favor of the U.S. Trustee, and thus Appellees/Cross Appellants have no stay relief to further proceed against Judith Broxmeyer (the Bankruptcy Court ruled from the bench, but no written order has been signed yet. It will be filed with this Court as soon as it is received).

9. In no event did the *Appellants* ever seek stay relief to continue the judicial proceedings below herein, though the jurisdiction of this Court resulted from the filing of Notices of Appeal pre-petition. In fact, Appellants filed their Initial Briefs *post-petition* on July 29, 1993, continuing the proceedings below but without stay relief from the Bankruptcy Court, which is absolutely *required*. 11 U.S.C. § 362(a). *Ellison*; *Farley*, supra.

10. At no time were either of the Bankruptcy Trustees of the Broxmeyers ever notified of the continuation of the judicial proceedings below here on appeal, such that they would approve or disapprove the continuation of this appeal; and in fact, the Bankruptcy Court for the Southern District of Florida has not been fully apprised of the circumstances of this appeal, and has not had an opportunity to determine whether continuing this appeal is in the best interest of the respective debtors' estates, their creditors, or is even in fact warranted considering the continuing and superseding jurisdiction of the Bankruptcy Court pursuant to Federal law and the Supremacy Clause of the United States Constitution. *Farley*.

11. By virtue of the Bankruptcy Court's suspension of the prior stay relief, Appellees/Cross-Appellants are unable to proceed further as a result of 11 U.S.C. § 362.

To permit the Appellants' appeals to move forward, while Appellees/Cross-Appellants' hands are tied, is grossly unfair and unjust. In fact, this Court is *without jurisdiction* to Order Appellees/Cross-Appellants to file *any briefs whatsoever* without the Bankruptcy Court below first ordering Stay Relief in both of the Broxmeyers' separate bankruptcy cases. *Farley*, supra; *Barton-Malow Company v. Gorman Company of Ocala*, 558 So.2d 519 (Fla. 5th DCA 1990).

12. The filing by the Appellees of their Answer Brief or Initial Brief on Cross-Appeal would be a continuation of the proceedings below against the Debtor Broxmeyers, which is precluded by the automatic stay in Marvin Broxmeyer's bankruptcy case, and the now reinstated stay in Judith Broxmeyer's separate bankruptcy case, and which ultimately could result in sanctions and damages against the Appellees/Cross-Appellants. 11 U.S.C. § 362(a) and (h).

13. Any Order requiring the Appellees to file a brief in this cause by this Court would be a violation of the automatic stay 11 U.S.C. § 362(a), and a continuation of the cause below without relief from the Automatic Stay by the Bankruptcy Court.

14. Any Order entered by this Court with respect to Appellants for, or against, would be Void as being entered during the automatic stay while this Court had absolutely no jurisdiction. *Personalized Air Conditioning, Inc. v. C.M. Systems of Pinellas County, Inc.*, 522 So.2d 465 (Fla. 4th DCA 1988). No Supersedeas Bond has been posted in these proceedings. *J.M. Beeson Company v. Sartori*, 553 So.2d 180 (Fla. 4th DCA 1989); *W.W. Gay Mechanical Contractor, Inc. v. Wharfside Two, Ltd.*, 545 So.2d 1348 (Fla. 1989); *Barton-Malow*, supra.

15. Appellees/Cross-Appellants would be damaged irreparably if their rights to further participate in this appellate proceeding were in any way diminished by this

Court, by reason of Appellants' Bankruptcy cases and the Automatic Stay provisions.

16. Appellants Cantor Samuel, Inc. and Royal Rehab Corp. are *both* scheduled co-debtors, and corporations owned by MARVIN BROXMEYER and JUDITH BROXMEYER, and Raymond H. Alfonso, and any action against the respective Debtors' or against co-debtors as a continuation of proceedings against the Bankruptcy Debtors below, in violation of 11 U.S.C. § 362.

17. An appellate proceeding, pursuant to 11 U.S.C. § 362 is a continuation of a proceeding against the Bankruptcy Debtors below, and therefore subject to the automatic stay. See *Ellison*, supra. See also Vol XI, No. 8 *ABI Journal* 25 (September 1992), "Status of Supersedeas Bonds in Bankruptcy: New Developments". See also: *Ingersoll-Rand Fin. Corp. v. Miller Mining Co.*, 817 F.2d 1424, 1426 (9th Cir. 1987); *Teachers Ins. & Annuity Ass'n of Am. v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986); *Marcus, Stowell & Beve Gov't Sec., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 230 n.4 (5th Cir. 1986); *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60 (6th Cir. 1983); *Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446 (3rd Cir. 1982); *Sheldon v. Munford, Inc.*, 902 F.2d 7 (7th Cir. 1990); and *Farley*, supra.

18. Since the Appellants have *already* filed their Initial Briefs *after* the filing of their respective bankruptcy petitions, *without* seeking stay relief in the Bankruptcy Court (or joining either of the Trustees in *these* proceedings), they *are in violation of the automatic stay*. 11 U.S.C. § 362, and subject to sanctions, contempt and damages. 11 U.S.C. § 362(h). Appelalnts have *never* sought relief from the automatic stay whatsoever from the Bankruptcy Court.

19. It is crystal clear that an appeal, as in this case, is a *continuation* of the proceedings had below against the debtors/appellants and their co-debtors, and therefore

would act to prejudice the Appellees who cannot respond without stay relief in both Bankruptcy cases, either as to the debtor/appellants or the co-debtor appellants. In other words, if the Appellees file an Answer Brief and Initial Brief on Cross Appeal against the co-debtors, that would be a continuation of the proceedings below against the Debtor/Appellants which are stayed as a result of filing for Bankruptcy and invoking the automatic stay provisions of 11 U.S.C. § 362. Likewise, the filing of an Initial Brief by a co-debtor/appellant, after the filing of a bankruptcy petition, is a continuation of the proceedings against the Debtor/Appellants below, which if without stay relief from the Bankruptcy Court, also violates 11 U.S.C. § 362.

20. Finally, movants are *precluded from seeking stay relief* to pursue this appeal, because they are not prosecuting the appeal, and it is up to the Trustees in the Broxmyers' two bankruptcy cases, and the Bankruptcy Court, to determine if an appeal should be pursued, and to move for stay relief accordingly.

21. As a result, the Initial Briefs filed by the Appellants are in violation of the Automatic Stay Provisions of 11 U.S.C. § 362(a), and are void and should be stricken; and further, all proceedings in this Court should be stayed pending complete stay relief in both of the bankruptcy cases below.

WHEREFORE, based upon the foregoing, the Appellees/Cross Appellants pray that this Court comply with the Automatic Stay provisions of 11 U.S.C. § 362, and stay proceedings herein until relief from Stay is granted, and further, that this Court strike the Appellants' Initial Briefs as being void and in violation of the Automatic Stay Provisions of 11 U.S.C. § 362(a), together with any and all such other and further relief as this Court deems proper.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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Case No. 93 12447-BKC-AJC

IN RE: MARVIN BROXMEYER
a/k/a MARVIN GLICK

*Debtor.*

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OBJECTION TO MOTION FOR RELIEF FROM STAY

Richard A. Osserman, counsel for the debtor makes this declaration under the penalties of perjury.

1. Debtor objects to the motion of creditors Paul and Edgar Elie for relief from the automatic stay.

1. This is an unheard of request in a Chapter 7 matter.

2. There is no property sought to be the subject of this motion, rather it is sought to have a debtor who has no assets burdened with further legal expense to defend proceedings, he can not afford to defend.

3. This is not the fourth serial bankruptcy filed by this debtor. It is his only filing. His wife from whom he is legally separated and two corporations in which he or his wife had an interest also filed.

4. Mr. Broxmeyer properly filed this case in New York and the Bankruptcy Court so found, however, because all of his creditors were in Florida, and any assets he had were interests in Florida entities and because the Chapter 7 Trustee did not feel able under the circumstances of conducting an examination into these matters from New York, venue was transferred to Florida.

5. The Order of the Court in New York, may have been appealable, however, when it was found that Florida Courts permitted telephonic communication, it was decided by counsel and the debtor not to appeal the decision.

6. Any examination of the debtor can be conducted by the movants in this Bankruptcy proceeding. There is no reason to subject this debtor to the expense of simultaneous proceedings in this Court and other courts.

7. Debtor is legally separated from his wife. He does not reside with her. He has no residence in Florida. He is working in New York City for a New York firm. He is prepared to answer all questions under oath by written interrogatories or by conference telephone.

8. Whether any of his assets should be the subject of a lift stay motion is a subject for the Chapter 7 Trustee to determine after examining the debtor.

9. I have and will consent to all reasonable requests of the Trustee or of the creditors. In that regard, I consented to increasing the time in which an action to prevent discharge may be brought and for consolidation for administration purposes with the filing of debtor's wife. I can not however consent to expending funds for needless purposes.

10. Debtor paid me a small fee, to represent him. He borrowed that from a member of his family, (not his wife) he does not have funds to retain further attorneys. So long as this matter can go forward on a telephonic basis, I will be able to continue as his counsel, provided that I am admitted for that purpose in the Bankruptcy Court in Florida. I am requesting counsel to make such a motion for me. In the meanwhile, I would ask this Court to permit me to appear with respect to this motion.

WHEREFORE, it is requested that the motion to lift stay be denied and for such other further and different relief as to this Court seems appropriate.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 91-1620

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DON FARLEY; ROBERT MENDENHALL,
*Appellees,*

v.

WILLIAM R. HENSON, JR.; PAUL M. HENSON; BOWES LYON RESOURCES LTD.; NATIONAL TRANSPORT SERVICES, INC.,
*Defendants,*

WESTARK SPECIALTIES, INC.,
*Appellant.*

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No. 91-1621

---

DON FARLEY; ROBERT MENDENHALL,
*Appellees,*

v.

WILLIAM R. HENSON, JR.,
*Defendant,*

PAUL M. HENSON,
*Appellant,*

BOWES LYON RESOURCES LTD.;
NATIONAL TRANSPORT SERVICES, INC.;
WESTARK SPECIALTIES, INC.,
*Defendants.*

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Appeals from the United States District Court
for the Western District of Arkansas

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Submitted: November 15, 1991

Filed: August 6, 1993

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Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and BEAM, Circuit Judge.

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BOWMAN, Circuit Judge.

Westark Specialties, Inc., ("Westark") and Paul Henson appeal from a judgment entered in the District Court [1] awarding Don Farley $3,246,000.00 and Robert Mendenhall $351,110.00 in damages on their common law fraud and federal securities law claims against Westark and Henson. During the pendency of these appeals, both Westark and Henson have filed bankruptcy petitions.[2] Farley suggests that the appeals are stayed as a result of appellants' bankruptcy filings. Westark and Henson counter that, because they brought these appeals, the appeals are not proceedings against the debtor, and therefore are not subject to the automatic stay of 11 U.S.C. § 362 (1988 & Supp. IV 1992). Although other courts have addressed the issue of whether an appeal brought by a debtor from a judgment obtained against it as a de-

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[1] The Honorable H. Franklin Waters, Chief United States District Judge for the Western District of Arkansas.

[2] Apparently, Westark and Henson could not afford to post supersedeas bonds and therefore resorted to bankruptcy in order to protect their assets against execution during the pendency of these appeals.

fendant is stayed by the debtor's bankruptcy, the issue is one of first impression for our Court. We conclude that such an appeal is stayed.

Section 362 provides that:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of—
>
> > (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title[.]

11 U.S.C. § 362(a)(1). The purpose of the automatic stay is to give the debtor "a breathing spell from his creditors" in which he may "attempt a repayment or reorganization plan." H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6296-97. The automatic stay also protects creditors by averting a scramble for the debtor's assets and promoting instead "an orderly liquidation procedure under which all creditors are treated equally." *Id.* at 340, *reprinted in* 1978 U.S.C.C.A.N. at 6297.

Because the automatic stay applies to "the commencement or continuation . . . of a judicial . . . proceeding against the debtor," 11 U.S.C. § 362(a)(1), it is well established that it does not apply to a proceeding brought by the debtor that inures to the benefit of the debtor's estate. *Merchants & Farmers Bank of Dumas, Ark. v. Hill,* 122 B.R. 539, 541 (E.D. Ark. 1990), and cases cited therein. The question then arises whether an appeal brought by a debtor from a judgment obtained against it

as a defendant is a "continuation" of a "proceeding against the debtor," and therefore subject to the automatic stay, or whether it may be viewed as an independent proceeding brought by the debtor. There is some state court authority for the proposition that such an appeal is not a proceeding against the debtor and therefore is not subject to the automatic stay. For example, in *Southern Bank & Trust Co. v. Harley*, 368 S.E.2d 908, 909 (S.C. 1988), the South Carolina Supreme Court held that, since the debtors' appeals could not "result in a dimunition [sic] of the estates," the automatic stay did not apply.

At least six federal circuits, however, have held that an appeal by a debtor in a case in which the debtor originally was the defendant is a "continuation" of a "proceeding against the debtor" and thus is subject to the automatic stay. *Ingersoll-Rand Fin. Corp. v. Miller Mining Co.*, 817 F.2d 1424, 1426 (9th Cir. 1987); *Teachers Ins. & Annuity Ass'n of Am. v. Butler*, 803 F.2d 61, 65 (2d Cir. 1986); *Marcus, Stowell & Beve Gov't Sec., Inc. v. Jefferson Inv. Corp.*, 797 F.2d 227, 230 n.4 (5th Cir. 1986); *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60 (6th Cir. 1983); *Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446 (3d Cir. 1982); *Sheldon v. Munford, Inc.*, 902 F.2d 7 (7th Cir. 1990) (holding that, even though the bankrupt has filed a supersedeas bond, his creditors have a stake in the outcome of the appeal and the appeal therefore is stayed). Under these decisions, whether a case is subject to the automatic stay is determined "from an examination of the debtor's status at the *initial* proceeding." *Cathey*, 711 F.2d at 62. We believe that these decisions are correct and join our sister circuits in holding that an appeal brought by a debtor from a judgment obtained against it as a defendant is subject to the automatic stay.

Several factors support our decision. First, the plain language of § 362(a)(1) appears to compel this result. It would strain the language of the statute to suggest that

an appeal by a debtor from a judgment obtained against the debtor as defendant is not a "continuation" of a judicial "proceeding against the debtor." *See Cathey*, 711 F.2d at 61 ("It is beyond peradventure that the instant appeals are continuations of judicial proceedings."). Second, the policies underlying the automatic stay are implicated even though the debtor, by bringing the appeal, seeks to escape or mitigate the adverse judgment. *See Sheldon*, 902 F.2d at 8-9 (noting that the policies behind the automatic stay are implicated because the estate has an interest in the outcome of the appeal and suggesting that the bankruptcy court should ensure that the debtor is adequately represented in the appeal).

Finally, to apply or not apply the automatic stay depending upon whether an appeal was taken "against" or "by" a debtor would be impractical and unworkable. Under such an approach, a debtor's appeal in a case originally brought against it as defendant would not be stayed, yet any cross-appeal by the plaintiff would be stayed. *See Association of St. Croix Condominium Owners*, 682 F.2d at 449. Moreover, even absent a cross-appeal, if the debtor prevailed in an appeal from a judgment obtained against it as defendant, both the filing of a petition for rehearing or for certiorari by the debtor's adversary and any proceedings required upon a remand would be stayed, since both would be "proceeding[s] against the debtor." *See Cathey*, 711 F.2d at 62; *Association of St. Croix Condominium Owners*, 682 F.2d at 449 n.2. We can not believe that Congress intended that the applicability of the automatic stay should depend upon "which party is ahead at a particular stage in the litigation." *Teachers Ins. & Annuity Ass'n of Am.*, 803 F.2d at 65.

We therefore hold that these appeals are stayed by the provisions of 18 U.S.C. § 362(a)(1). Of course, any of the parties to these appeals may apply to the bankruptcy court for relief from the stay pursuant to the provisions

of 11 U.S.C. § 362(d) (1988). Only the bankruptcy court may grant relief from the automatic stay. The parties are directed to inform this Court when the stay is lifted or when it lapses. These appeals then may proceed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

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Case No. 92-2900

L.T. Case No. 90-37325 (16)

MARVIN BROXMEYER, JUDITH BROXMEYER, *et al.*,
*Appellants*

v.

PAUL ELIE, EDGAR ELIE, *et al.*,
*Appellees*

---

# REQUEST FOR ORAL ARGUMENT ON APPELLEES' MOTION TO STAY APPELLANTS' APPEALS AND FOR A STAY ON APPELLEES' CROSS-APPEAL AND TO STRIKE APPELLEES' INITIAL BRIEFS AS BEING VOID AND IN VIOLATION OF 11 U.S.C. § 362(a) AUTOMATIC STAY PROVISIONS

APPELLEES, Paul Elie and Edgar C. Elie, by and through undersigned counsel, respectfully request Oral Argument in the above-styled cause with respect to their Motion To Stay Appellants Marvin Broxmeyer and Judith Broxmeyer's Appeals As Well as Other Appellants And for Stay on Appellees' Cross-Appeal and/or To Strike Appellants' Initial Briefs As Being Void And In Violation of 11 U.S.C. § 362(a) Automatic Stay Provisions.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

---

District Court Case No. 92-2900

Lower Tribunal Case No. 90-37325 (16)

MARVIN BROXMEYER, JUDITH BROXMEYER, *et al.*,
*Appellants,*

VS.

PAUL ELIE, EDGAR ELIE, *et al.*,
*Appellees.*

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## APPELLANTS' RESPONSE TO APPELLEES' ALTERNATIVE MOTION TO STAY APPEAL OR STRIKE APPELLANTS' INITIAL BRIEFS

The Appellants file this Response to the Appellees' Alternative Motion to Stay Appeal or Strike the Appellants' Initial Briefs served on September 2, 1993, and state as follows:

1. The Appellees' alternative motions are directly controlled by this court's decision in *Marine Charter & Storage, Ltd., Inc. v. All Underwriters at Lloyds of London, etc.*, 568 So.2d 944 (Fla. 4th DCA 1990), wherein the court adopted in toto the opinion of Chief Judge Schwartz in *Shop in the Grove, Ltd. v. Union Federal Savings and Loan Association of Miami*, 425 So.2d 1138 (Fla. 3d DCA 1982). The court stated:

> We deny the motions [to stay] on the ground that the present appeals by the debtor-defendant from judgments rendered against it do not fall within the purview of this [automatic stay] provision. While we are guided by no prior authority whatever under the

> recently enacted statute, *it seems self-evident that an appeal, initiated and to be prosecuted by the debtor may be considered neither the continuation . . . of a proceeding against" it [citation omitted]; the "enforcement" of the judgments previously obtained; nor an "act to obtain possession" of its property.* The manifest purpose of the automatic stay provision is to act as a debtor's shield from proceedings which may adversely affect its interest; that purpose will hardly be served by requiring an indefinite suspension of the appellant's attempts to be relieved of the judgments with the obvious effect of acting the debtor's sword against the creditor's claims upon it.

568 So.2d at 946.

2. The Appellants have reasonably relied on this court's controlling 1990 decision in *Marine Charter & Storage, Ltd., Inc.*, and have thus not previously sought relief from the automatic stay provision.

3. The Appellees cite numerous federal cases in support of their motion, only one of which was issued by the Eleventh Circuit Court of Appeals, *Ellison v. Northwest Engineering Co.*, 707 F.2d 1310 (11th Cir. 1983). The Appellees' reliance on *Ellison* is severely misplaced; Ellison involved a bankruptcy petition filed by an appellee, not an appellant. The *Ellison* court stayed the continued prosecution of an appeal *against* the debtor/appellee. In *Cathey v. Johns-Manville Sales Corp.*, 711 F.2d 60 (6th Cir. 1983), a case relied on by the Appellees *sub judice*, the Sixth Circuit cited the contrary Eleventh Circuit authority (albeit in an non-published order) of *Hendrix v. Raybestos-Manhattan, Inc.*, No. 82-8538 (11th Cir. December 22, 1982). *Cathey, supra* at 62.

4. The bankruptcy court has afforded the Appellees stay relief, as alleged in paragraph 8 of their motion, but such stay relief has never been "suspended". Rather, the bankruptcy court ruled on August 24, 1993, that a

particular asset owned by the Appellant, JUDITH BROXMEYER, would not be sold at a scheduled sheriff's sale (with the proceeds to be applied in satisfaction of the Appellees' judgment), but would be sold by the trustee in bankruptcy for the benefit of the debtor or the debtor's estate—depending on the disposition of a related appeal pending in this court.

5. The Appellees' motion constitutes their *twelfth* attempt to either dismiss the instant appeal or strike the Appellants' briefs.

6. The Appellees' motion has been made in bad faith. Since the dates of the filings of the subject bankruptcy petitions, the Appellees have filed two motions to dismiss this appeal, five objections and/or motions to strike the Appellants' briefs, a Reply, a "Notice", a motion to supplement the record, and a motion for extension of time in which to file their Answer Brief. *Not one of these 11 filings alleges the Appellants to be in violation of the automatic stay provision.* Indeed, it was not until the bankruptcy court cancelled the aforementioned sheriff's sale (through its ruling from the bench on August 24) that the Appellees determined that the continuation of this appeal would not be in their best interests.

7. If this court desires that the Appellants obtain an order authorizing them to continue the prosecution of this appeal, they will expeditiously seek and obtain such relief. However, the Appellants request that the filing deadlines not be tolled by reason of the Appellees' belated, bad faith motion.

WHEREFORE, the Appellants pray that the Appellees' alternative motions be denied.

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ELIOT R. WEITZMAN, ESQ.
Fla. Bar No. 203211

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

---

Case No. 92-2900

L.T. Case No. 90-37325 (16)

MARVIN BROXMEYER, JUDITH BROXMEYER, *et al.*,
*Appellants*

v.

PAUL ELIE, EDGAR ELIE, *et al.*,
*Appellees*

---

# NOTICE OF SUPPLEMENTAL AUTHORITY TO APPELLEES' MOTION TO STAY APPELLANTS' APPEALS AND TO STRIKE APPELLANTS' INITIAL BRIEF AS BEING IN VIOLATION OF THE AUTOMATIC STAY PROVISIONS 11 U.S.C. § 362(a)

APPELLEES, Paul Elie and Edgar C. Elie, cite as supplemental authority to their Motion to Stay Appellants' Appeals and to Strike Appellants' Initial Briefs as being in violation of the Automatic Stay Provisions 11 U.S.C. § 362(a), the following cases and Constitutional authority:

1. *Kalb v. Feuerstein*, 308 U.S. 434; 60 S.Ct. 343 (1940) (copy attached).

2. *Borman v. Raymark Industries*, 946 F.2d 1031 (3rd Cir. 1991) (copy attached).

3. *Maritime Electric Company, Inc. v. United Jersey Bank*, 959 F.2d 1194 (2nd Cir. 1992) *reh. den. Id.* at 1209 (copy attached).

4. *Commerzanstalt v. Telewide Systems, Inc.*, 790 F.2d 206 (2nd Cir. 1985) (copy attached).

5. *Matter of Celotex Corp.*, 128 B.R. 478 (Bankr. M.D. Fla. 1991) (copy attached).

6. *Balaber-Strauss v. Reichard*, 835 F.2d 54 (2nd Cir. 1987) (*In Re: Tampa Chain Company*) (copy attached).

7. *O'Neill v. Continental Airlines, Inc.*, 928 F.2d 127 (5th Cir. 1991) (*In the Matter of Continental Airlines*) (copy attached).

8. *Borg-Warner Acceptance Corporation v. Hall*, 685 F.2d 1306 (11th Cir. 1992) (copy attached).

9. *Ellison v. Northwest Engineering Company*, 707 F.2d 1310 (11th Cir. 1983) (copy attached).

10. *Cathey v. Johns-Manville Sales Corporation*, 711 F.2d 60 (6th Cir. 1983) (copy attached).

11. *In the Matter of King*. 35 B.R. 530 (Bankr. N.D.Ga. 1983) (copy attached).

12. *Matter of Florida Dairy, Inc.*, 22 B.R. 197 (Bankr. M.D.Fla. 1982) (copy attached).

13. *Personalized Air Conditioning, Inc. v. C.M. Systems of Pinellas County, Inc.*, 522 So.2d 465 (Fla. 4th DCA 1988).

14. Pursuant to the provisions of Comity between State and Federal Courts, and the Supremacy Clause of the United States Constitution, Art. VI, cl. 2, notwithstanding State law, this Court is bound to follow the dictates of Congress and Federal law, which pursuant to Art. I, § 8, cl. 4 of the United States Constitution absolutely and resolutely establishes complete and sole power of the United States Government, The Congress of the United States, and the Federal judiciary as Sovereign, to establish "uniform Laws on the subject of Bankruptcies throughout the United States".

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

---

Case No. 92-2900

L.T. Case No. 90-37325 (16)

MARVIN BROXMEYER, JUDITH BROXMEYER, *et al.*,
*Appellants,*

vs.

PAUL ELIE, EDGAR ELIE, *et al.*,
*Appellees.*

---

## APPELLANTS' MOTION TO STRIKE APPELLEES' NOTICE OF SUPPLEMENTAL AUTHORITY

The Appellants file this Motion to Strike the Appellees' Notice of Supplementary Authority served on September 13, 1993, and as grounds therefor, state as follows:

1. The Appellees served a motion to stay this appeal or strike the Appellants' initial briefs on September 2, 1993. The Appellants timely served a response to this motion on September 7, 1993. Fla. R. App. P. 9.300(a). The parties are not permitted to present additional argument to the court in the form of a response, or otherwise, without obtaining leave of court.

2. On September 13, 1993, the Appellees served a reply to the Appellants' response through the vehicle of a "Notice of Supplemental Authority". The Notice contains 14 paragraphs, 14 of which consist of case citations. The final paragraph consists solely of argument.

3. The Appellees should not be permitted to reply to the Appellants' response under the guise of submitting a Notice of Supplemental Authority.

4. Rule 9.210(g) of the Florida Rules of Appellate Procedure has no application here. That provision applies before a decision has been rendered on the merits of the appeal, but *after* the filing of the last brief. Moreover, the rule does not contemplate the filing of a Notice containing numerous legal citations that should have been cited in the briefs themselves.

WHEREFORE, the Appellants pray that this court enter an order striking the Appellees' Notice of Supplementary Authority.

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IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

---

Case No. 92-2900

L.T. Case No. 90-37325 (16)

MARVIN BROXMEYER, JUDITH BROXMEYER, *et al.*,
*Appellants*

v.

PAUL ELIE and EDGAR ELIE,
*Appellees*

---

## RESPONSE TO APPELLANTS' MOTION TO STRIKE APPELLANTS' NOTICE OF SUPPLEMENTAL AUTHORITY

APPELLEES, Paul Elie and Edgar C. Elie, by and through undersigned counsel, file their Response to Appellants' Motion To Strike Appellees' Notice of Supplemental Authority and show:

1. The threshold issue before this Court, and the crucial issue to be preliminarily decided by this Court is: Can a State Court Order a litigant to violate Federal law or face adverse consequences as a result of refusing to violate Federal law?

2. The Appellees have repeatedly raised the existence of the Broxmeyers' Bankruptcy Cases and the Automatic Stay pursuant to 11 U.S.C. § 362(a) to this Court and shown that as a matter of Jurisdiction this appellate case cannot move forward *unless* complete stay relief is granted by the Bankruptcy Court to proceed.

3. Appellants apparently are asserting the proposition that the Appellees must be forced by this Court to move

forward in these proceedings in violation of Federal law or face adverse consequences; and then ultimately face sanctions as a result thereof by motion or adversary from any one of approximately twenty creditors in Judith Broxmeyer's bankruptcy case, and seven creditors in Marvin Broxmeyer's case. Not to mention two separate trustees, and one overworked bankruptcy judge.

4. It is because of the uncertainty of sanctions imposed, and multiplicity of adversary suits that potentially could be filed against the Appellees here, and the fact that 11 U.S.C. § 362(a) is designed to Stay proceedings such as these, that Appellees are dutibound to point out the Jurisdictional defect of this Court's proceeding any further on this matter without some relief from the automatic stay. Appellees have repeatedly sought stay relief from or in the alternative dismissal of the Broxmeyers' bankruptcy cases. Marvin Broxmeyer objected to stay relief claiming he no longer wished to litigate with anyone (presumably he has therefore waived this appeal). Judith Broxmeyer has sought to have the automatic stay reimposed, which Order was granted by the Bankruptcy Court. Both Mr. Broxmeyer's objection and the Order reinstating the Stay in Judith Broxmeyer's case have previously been provided to this Court.

5. The Notice of Supplemental Authority contains formal citations of authority which have been provided to this Court in assisting it in determining whether or not it has Jurisdiction over these matters at present. The Notice of Supplemental Authority cites the United States Constitution, which is binding authority on the States, as well as the U.S. Bankruptcy Code, and cases interpreting.

6. The Appellants would have this Court strike controlling case authority merely because it does not suit their purposes of compelling the Appellees into a litigation trap from which there is no return (mainly the wrath of the Broxmeyers' creditors, their trustees, and the Bankruptcy Court).

7. If the Appellants merely wanted this case to go forward, the key is in *their hands.* They need only seek stay relief. This they will not do and in fact have objected to in the Bankruptcy Court. Therefore, it is not the Appellees' prerogative to face a dearth of adverse consequences, after having sought stay relief, and having either not been able to acquire it, or in the alternative having acquired it, and then having the stay reinstated at the Appellants' demand. It is up to the Appellants if they intend to fish in the bankruptcy courts and cut bait here; or cut bait in the bankruptcy courts, and fish here.

WHEREFORE, the Appellees pray that this Court deny the Appellants' Motion To Strike Appellees' Notice of Supplemental Authority.

IN THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FOURTH DISTRICT

---

Case No. 92-02900

L.T. Case No. 90-37325 16 Broward

MARVIN BROXMEYER, JUDITH BROXMEYER, *et al.*,
*Appellant-Cross Appellee(s),*

vs.

PAUL ELIE, EDGAR ELIE, *et al.*,
*Appellee-Cross Appellant(s).*

---

October 6, 1993

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BY ORDER OF THE COURT:

ORDERED that appellees' motion filed September 3, 1993, to stay appellants, Marvin Broxmeyer and Judith Broxmeyer's appeals as well as other appellants and for stay on appellees' cross-appeal and/or to strike appellants' initial briefs as being void and in violation of 11 U.S.C. § 362(a) automatic stay provisions is hereby denied; further,

ORDERED that appellees' request filed September 3, 1993, for oral argument on appellees' motion to stay appellants' appeals and for stay on appellees' cross-appeal and to strike appellants' initial briefs as being void and in violation of 11 U.S.C. § 362(a) automatic stay provisions is hereby denied;

ORDERED that appellees/cross-appellants' motion filed September 20, 1993, for extension of time to file the answer/initial brief is granted and appellees/cross-appellants shall serve the answer/initial brief within twenty (20) days from the date of the entry of this order. In addition, appellees/cross-appellants are notified that the failure to serve the brief within the time provided herein may foreclose appellees/cross-appellants' right to file a brief or otherwise participate in this appeal; further,

ORDERED that appellants' motion filed September 27, 1993, to strike appellees' notice of supplemental authority is hereby denied; further,

ORDERED that the parties and counsel are directed to review *Dubowitz v. Century Village East Inc.*, 381 So. 2d 252 (Fla. 4th DCA 1979). The motion practice in this case is excessive. Counsel are warned that further abuse will lead to sanctions.

IN THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

---

Case No. 90-37325 (16)

Florida Bar #263249

PAUL ELIE and EDGAR C. ELIE,
*Plaintiffs, Appellees,*

vs.

LEVLEX ENTERPRISES, LTD., a New York Corporation, CANTOR SAMUEL CORP., a Florida Corporation, ROYAL REHAB CORP., a Florida Corporation, MARVIN BROXMEYER, JUDITH BROXMEYER, his wife, citizens and residents of Florida, STEVEN R. BROWNSTEIN and RAYMOND H. ALFONSO,
*Defendants, Appellants.*

---

## NOTICE OF APPEAL

NOTICE IS GIVEN that the Defendants, Appellants, MARVIN BROXMEYER, JUDITH BROXMEYER, LEVLEX ENTERPRISES, LTD., ROYAL REHAB CORP. and CANTOR SAMUEL, INC., by and through their undersigned attorney, take and enter their appeal to the Fourth District Court of Appeals of the State of Florida to review the Final Judgment of this Court, bearing date the 26th day of August, 1992 and rendered on the 4th day of September, 1992 and a copy of which is attached hereto as Exhibit "A" and incorporated by ref-

erence. The nature of the Final Judgment appealed from is a Final Judgment against the Defendants, Appellants.

JEFFREY D. KASTNER, P.A.
Attorney for Appellants,
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ROYAL REHAB and BROXMEYERS
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By: /s/ Jeffffrey D. Kastner,
JEFFREY D. KASTNER, ESQUIRE

EXHIBIT A

IN THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

---

Case No. 90-37325 (16)

JUDGE: MORIARITY/MARKO

PAUL ELIE and EDGAR C. ELIE,
*Plaintiffs,*

-VS-

LEVLEX ENTERPRISES, LTD., a New York Corporation, CANTOR SAMUEL CORP., a Florida Corporation, ROYAL REHAB CORP., a Florida Corporation, MARVIN BROXMEYER, JUDITH BROXMEYER, his wife, citizens and residents of Florida, STEVEN R. BROWNSTEIN and RAYMOND H. ALFONSO,
*Defendants.*

---

FINAL JUDGMENT

THIS CAUSE came before the Court for jury trial on the 17th, 18th, 19th, and 20th of August, 1992. The matters tried before the jury consisted of Plaintiffs' claims against all the Defendants for civil conspiracy to conceal the assets of co-Defendant, RAYMOND H. ALFONSO from Plaintiffs as Alfonso's creditors, and a cause of action to set aside a fraudulent conveyance and subsequent fraudulent encumbrance concerning real property in which Co-Defendant RAYMOND H. ALFONSO had a concealed interest. The Defendant, RAYMOND H. ALFONSO failed to file any responsive pleading or paper in this Cause, and provisional remedies were separately granted to Plaintiffs in this matter concerning ALFONSO's property that was in the hands of the other co-Defendants.

On August 20th, the jury after trial, and the close of the evidence, returned a verdict on special jury interrogatories, finding that MARVIN BROXMEYER, JUDITH BROXMEYER, ROYAL REHAB CORP., a Florida Corporation, CANTOR SAMUEL, INC., a Florida Corporation, and LEVLEX ENTERPRISES, LTD., a New York Corporation, conspired to conceal property of RAYMOND H. ALFONSO; and that the TransFlorida Bank Building, lying and situate in Broward County, Florida, to-wit:

> Unit No.s 102, 103, 104, 201, 202, 203, 204, 205, and 301, TRANSFLORIDA BANK EXECUTIVE CENTRE, a Condominium, according to the Declaration of Condominium thereof, as recorded in O.R. Book 16735, at Page 0198, of the Public Records of Broward County, Florida.

was fraudulently conveyed from ROYAL REHAB CORP., a Florida Corporation as Grantor, to CANTOR SAMUEL, INC., a Florida Corporation as Grantee. Subsequently, CANTOR SAMUEL, INC., a Florida Corporation, fraudulently encumbered the TransFlorida Bank Building with a Mortgage in favor of LEVLEX ENTERPRISES, LTD., a New York Corporation. The evidence adduced at trial revealed that ROYAL REHAB CORP., CANTOR SAMUEL, INC., and LEVLEX ENTERPRISES, LTD., were corporations wholly owned and controlled by Defendants MARVIN and JUDITH BROXMEYER and RAYMOND H. ALFONSO. The jury then returned a verdict in general damages for $1,700,000.00 (ONE MILLION SEVEN HUNDRED THOUSAND DOLLARS) in favor of the Plaintiffs, PAUL ELIE and EDGAR C. ELIE.

IT IS THEREFORE ORDERED, ADJUDGED, and DECREED that Plaintiffs PAUL ELIE and EDGAR C. ELIE have and recover from the Defendants, and all of them, jointly and severally the sum of $1,700,000.00

(ONE MILLION SEVEN HUNDRED THOUSAND DOLLARS), which shall bear interest at the rate of 12% per year, for which sum let execution issue *FORTHWITH.*

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the Plaintiffs PAUL ELIE and EDGAR C. ELIE have from the Defendants and recover from them a 20% interest in all of the stock in ROYAL REHAB CORP., a Florida Corporation, and ROYAL REHAB OF TEXAS, INC., a Texas Corporation which Defendants control.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the conveyance from ROYAL REHAB CORP., a Florida Corporation to CANTOR SAMUEL, INC., a Florida Corporation, transferring by Quitclaim Deed recorded at OR BOOK 16,933 at page 0361, of the official Public Records of Broward County, Florida, the TransFlorida Bank Building from ROYAL REHAB CORP. to CANTOR SAMUEL, INC. be and the same is hereby determined to be a fraudulent conveyance, and it is henceforth Ordered and Decreed that said conveyance *is* set aside, vacated, and declared NULL and VOID, and of no further effect or validity.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the encumbrance consisting of a second Mortgage from CANTOR SAMUEL, INC., as Mortgagor to LEVLEX ENTERPRISES, LTD., as Mortgagee, with the TransFlorida Bank Building being the security therefor, recorded at OR BOOK 17,974 at page 0818, of the Official Public Record of Broward County, Florida, be and the same *is* hereby determined to be a fraudulent encumbrance and it is henceforth Ordered and Decreed that said encumbrance is set aside, vacated, and declared NULL and VOID, and of no further effect or validity.

The Court hereby reserves jurisdiction to award costs to the Plaintiffs as the prevailing parties in the lawsuit,

and to do all things necessary to carry out the adjudications herein.

All WRITS and PROCESS necessary to effectuate the adjudications of this Final Judgment, including execution for all sums shall issue *FORTHWITH* and without delay.

DONE AND ORDERED this 26 day of August, 1992, in Chambers at Ft. Lauderdale, Broward County, Florida.

/s/ Paul Marko, III
HONORABLE PAUL MARKO, III
Circuit Court Judge

[Filed Nov. 8, 1993]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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Case No.: 93-12447-BKC-AJC

Chapter 7

IN RE: MARVIN BROXMEYER, a/k/a Marvin Glick,
*Debtor*

---

Adv. No. 93-1185-BKC-AJC-A

Chapter 7

PAUL ELIE and EDGAR C. ELIE,
*Plaintiffs,*

v.

MARVIN BROXMEYER, a/k/a MARVIN GLICK, DEBTOR,
*Defendant.*

---

## COMPLAINT OBJECTING TO DISCHARGE OF DEBTOR FROM CERTAIN DEBTS AND ALL OF HIS DEBTS

Plaintiffs, PAUL ELIE and EDGAR C. ELIE ("ELIE") by and through undersigned counsel, file this, their adversary Complaint Objecting to Discharge of Debtor From Certain Debts and All of His Debts and sue MARVIN BROXMEYER, a/k/a MARVIN GLICK, Debtor/Defendant ("DEBTOR") and state:

## PARTIES

1. Plaintiffs, PAUL ELIE and EDGAR C. ELIE are Creditors pursuant to 11 U.S.C. § 101, et seq. of MARVIN BROXMEYER, a/k/a MARVIN GLICK ("DEBTOR"), the Debtor/Defendant, in the main bankruptcy case of In Re: MARVIN BROXMEYER, a/k/a MARVIN GLICK, Case No. 93-12447-BKC-AJC (Bankr. S.D.Fla.), being maintained under Chapter 7 of Title 11 United States Code ("Bankruptcy Code").

## JURISDICTION

2. This is a core matter pursuant to Federal Rule of Bankruptcy Procedure 7008(a) in a proceeding under Chapter 7 of the Bankruptcy Code entitled In Re: Marvin Broxmeyer, a/k/a Marvin Glick, Debtor, Case No. 93-12447-BKC-AJC (Bankr. S.D. Fla.), which concerns both the Dischargeability of the Debtor from his debts, and from certain of his debts.

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 157(b)(2)(I) and 28 U.S.C. § 157 (b)(2)(J), 28 U.S.C. § 1334 and the District Court's general order(s) of reference.

## ALLEGATIONS COMMON TO ALL COUNTS

3. The Debtor is an individual who was engaged in various business ventures both individually and with his wife, JUDITH BROXMEYER, within the Jurisdiction of this Court. She is involved in the related, and administratively consolidated case of In Re: Judith Broxmeyer, a/k/a Judith A. Harris, Case No. 93-11453-BKC-AJC (Bankr.S.D.Fla.).

4. Some of those ventures included operations through the following corporations in which the Debtor, her husband, or both of them, owned stock or have an interest:

a. Royal Rehab Corp., a Florida Corporation;

b. Royal Rehab of Texas, Inc., a Texas Corporation;

c. Cantor Samuel, Inc., a Florida Corporation;

d. Levlex Enterprises, Ltd., a New York Corporation;

e. Dobrick, Inc., a Florida Corporation;

f. Restoration Resources, Inc., a Florida Corporation;

g. Palmetto Park 1489 Corp., a Florida Corporation;

h. New Boca Palms Corp., a Florida Corporation;

i. High Ridge 3000, Inc., a Florida Corporation;

j. Oakland 601 Corp., a Florida Corporation;

k. Oakland 601, Ltd., a Florida Limited Liability Company;

l. University 4200, Inc., a Florida Corporation;

m. South 1120 Corp., a Florida Corporation;

n. G.L.K. Investments, Inc., a Florida Corporation;

o. Glick-Bahamian, Inc., a Florida Corporation;

p. Retail Rehab Corp., a Florida Corporation;

q. Royal Rehab of Texas, Inc., a Texas Corporation;

r. Rental Rehab Corp., a Florida Corporation;

s. Rental Rehab Corp., a Texas Corporation;

t. 11601 Cedar Corp., a Texas Corporation;

u. Bayshore 21, a Florida Corporation;

v. DuPont Commercial, Inc., a Florida Corporation;

w. O-Prop, Inc., a Florida Corporation;

x. M.G.M. of Florida, Inc., a Florida Corporation;

y. Marvin Glick Enterprises, Inc., a Florida Corporation;

z. Belmark Realty and related companies, and a host

of other corporations believed to be strung across the United States and possibly a few in Canada. Upon information and belief, the Debtor has been involved with all of the above-catalogued corporations within two years next preceding the filing of his petition for relief. Although some corporations may appear to have been involuntarily dissolved, it is believed by these creditors that the Debtor uses these corporations as "fronts" to maintain property and bank accounts to avoid personal title vesting in any property.

5. Each of the aforementioned corporations in Paragraph 4, sub-parts a through z, provided income and sustenance to the Debtor and his wife within two years prior to the Debtor filing bankruptcy in the main cause of this case. In addition, the Debtor had prepared a financial statement, Exhibit "A", also known as "Robertson 2(a)—(f)". The Debtor has never satisfactorily explained the sudden loss of over $7,000,000.00 in assets.

6. Dobrick, Inc. filed bankruptcy in the Southern District of Florida pursuant to Chapter 7 of the Bankruptcy Code on or about December 17, 1992. The Debtor herein did not execute that Petition, In Re: Dolbrick, Inc. [sic], Case No. 92-17110-BKC-AJC (Bankr. S.D.Fla.); however, he signed an affidavit and stock certificates indicating that he was the president of that corporation. See Exhibit "B" attached hereto. Dobrick, Inc. was a "Holding Company" for the Debtor and his wife, Judith Broxmeyer, which served to hold stock in other corporations. The Debtor and his wife have maintained that this Corporation was a "household" account. In reality, it was a "clearinghouse" used by the Broxmeyers to defraud creditors. See Exhibit "C" attached hereto being a Judgment rendered in the State Court on March 9, 1993.

7. In addition, the Debtor here received income from Dobrick, Inc. in 1992 which he failed to schedule in his Statement of Financial Affairs at either questions 1 or 2

thereof. See Exhibit "D" attached hereto being a copy of a check cashed by the Debtor in a substantial sum of money.

8. Royal Rehab Corp. filed bankruptcy in the Southern District of Florida pursuant to Chapter 11 of the Bankruptcy Code on or about December 21, 1992, indicating that Marvin Broxmeyer was the President of Royal Rehab Corp., and the 100% shareholder. Later, during the proceedings in the Southern District of New York, to change venue to this Court, the Debtor *disclaimed* that he owned 100% of the stock in Royal Rehab Corp. See Exhibits "E" and "F" attached hereto being his contradictory testimony concerning this stock ownership.

9. Levlex Enterprises, Ltd. is a New York corporation which was formed in 1974 in New York State, and served as a "Flagship" corporation through which the Debtor and his wife, JUDITH BROXMEYER ran their financial empire from approximately April of 1977 through September of 1992. The stock in this corporation was reputedly owned by Dobrick, Inc., the "Holding Company". The Debtor in his Statement of Financial Affairs, question 16(a) indicated that he had terminated his relationship with Levlex Enterprises, Ltd. in September of 1992; but in fact, the Debtor in his testimony (Exhibit "E" hereof) testified that he in fact still had something to do with Levlex Enterprises, Ltd., and was in fact selling condominium coop apartments belonging to Levlex purportedly on behalf of his wife. Additionally the Debtor failed, in his Statement of Financial Affairs at questions 1 and 2, to disclose his income from Levlex Enterprises, Ltd.

10. Cantor Samuel, Inc. is a Florida Corporation which has been administratively dissolved by the Secretary of State of Florida. Purportedly, Marvin Broxmeyer owned 90% of the stock in this corporation; however, the Debtor at question 16(a) of his Statement of Financial Affairs failed to disclose his activities with this corpora-

tion within the two years, next preceding the filing of the bankruptcy case. See Exhibit "J", attached.

11. Restoration Resources, Inc. is a Florida Corporation which has been run as a "pass through" corporation, which was used by the Debtor and his wife, Judith Broxmeyer, as yet another "Holding Company" through which funds were passed and ultimately deposited in accounts held by Dobrick, Inc. or Levlex Enterprises, Ltd. The Debtor at question 16(a) failed to disclose his activities with this corporation within two years, next preceding the filing of the bankruptcy case.

12. The remaining balance of corporations, set forth in Paragraph 4, subparts "a" through "z" have not been listed at question 16(a) of the Debtor's Statement of Financial Affairs.

13. Levlex Enterprises, Ltd. owned at one time 17 condominium coop apartments in Harrison, Westchester County, New York. In the two year period of time preceding the Debtor's having filed for bankruptcy in this case, the Debtor and his wife, Judith Broxmeyer, commenced to liquidate the condominium coop apartments, the bulk of which were liquidated between September of 1992 and within the 30 days preceding the filing of the Debtor's Chapter 7 bankruptcy petition. The Debtor failed at Item 2 of his Statement of Financial Affairs, to disclose this source of income, as well as the income received from the other corporations set forth in Paragraph 4, subparts "a" through "z". In fact, the Debtor testified in August of 1992 that Levlex provided income for *both* he and his wife, Judith Broxmeyer, although she reputedly declared the income to the I.R.S. (See excerpt of trial testimony attached hereto as Exhibit "G").

14. In his Statement of Finanicial Affairs (question 1), the Debtor disclosed that he received no income in 1991; however, he in fact did receive income in 1991. See Exhibit "H" attached hereto, being his 1991 tax return.

15. In addition, in his Statement of Financial Affairs, the Debtor omitted all reference to his ownership interest in the Belmark Realty companies. See Exhibit "I" attached hereto, being a copy of part of a trial exhibit from August of 1992.

16. In his Statement of Financial Affairs (question 17a through c), the Debtor claimed that no one kept or supervised the keeping of books for this Debtor, or audited the books for the Debtor, and/or were in possession of the books and records of the Debtor, and in fact one Herb Deuschel was the Debtor's bookkeeper and tax accountant and that he (the Debtor), at the time of the commencement of the Debtor's Chapter 7 bankruptcy case, was in possession of the books of accounts and records of the Debtor.

17. In summary, the Debtor has failed to account for and disclose his association with various business entities, failed to account for assets, and failed to disclose material facts in his Petition and Statement of Financial Affairs and Schedules in this Chapter 7 bankruptcy case. All of which is a past transaction or present asset to which the Debtor's creditors might have objected, had the Debtor properly scheduled these assets and business affiliations, and been able to account for them.

18. The Objecting Creditors, PAUL ELIE and EDGAR C. ELIE, hold a valid Judgment and Execution against the Debtor, pursuant to a Verdict rendered on Special Interrogatories (Exhibits "K", "L", and "M") for Conspiracy to Hinder, Delay and Defraud the Creditors in their pursuit of a former bankrupt's assets, e.g., Raymond H. Alfonso. Mr. Alfonso filed a no-asset, Chapter 7 Bankruptcy Petition in May of 1988 in the Southern District of Florida, In Re: Raymond H. Alfonso, Case No. 88-01953-BKC-SMW (Bankr.S.D. Fla.). Subsequently it was discovered that Mr. Alfonso failed to schedule various assets and business ventures in his schedules and statement of financial affairs. He was denied

discharge at *In Re: Alfonso*, 94 B.R. 777 (Bankr. S.D. Fla.1988). Later it was proved by these Creditors that the Debtor, his wife, Judith Broxmeyer, and their various companies wilfully, maliciously and intentionally assisted Alfonso in concealing his assets from these creditors during the Alfonso bankruptcy case, and after discharge was denied. At the time of the filing of the Debtor's case, Mr. Alfonso's bankruptcy case was still open, and pending further disposition.

19. Further, during the pendency of the Dobrick, Inc. bankruptcy, the Debtor disposed of a 1985 Rolls Royce which was property of Dobrick, Inc. without first obtaining an Order from the Bankruptcy Court, during a period of time when the Trustee had not abandoned any assets of Dobrick, Inc.'s estate. By disposing of the Rolls Royce, the Debtor committed an act contrary to 11 U.S.C. § 362(a) and 18 U.S.C. § 152.

20. Further, in Schedule B of the Debtor's Petition, items 20 and 33, the Debtor failed to schedule a personal injury claim which he is pursuing, in which he allegedly suffered severe personal and neurological injuries. See Exhibit "N" attached hereto, and indicated "none" where in fact he did have a claim for money damages, to which the Creditors might have objected or been provided a distribution.

21. The Debtor claims he has no assets and seeks a discharge by this Court from his debts.

COUNT I- 11 U.S.C. § 727(a)(2)

All allegations of the preceding paragraphs are realleged.

22. The Debtor's discharge should be denied under 11 U.S.C. § 727(a)(2) because he has fraudulently concealed property belonging to the Estate.

COUNT II—11 U.S.C. § 727(a)(3)

All allegations of the preceding paragraphs are realledged.

23. The Debtor's discharge should be denied under 11 U.S.C. § 727(a)(3) because the Debtor has failed to maintain and preserve adequate financial records.

COUNT III—11 U.S.C. § 727(a)(4)(A)

All allegations of the preceding paragraphs are realleged.

24. The Debtor's discharge should be denied under 11 U.S.C. § 727(a)(4)(A) because the Debtor has knowingly and fraudulently made false oaths in his schedules of Assets, Statement of Financial Affairs in, or in connection with the case.

COUNT IV—11 U.S.C. § 727(a)(4)(D)

All allegations of the preceding paragraphs are realleged.

25. The Debtor's discharge should be denied under 11 U.S.C. § 727(a)(4)(D) because the Debtor has withheld from the Trustee, recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs.

COUNT V—11 U.S.C. § 727(a)(5)

All allegations of the preceding paragraphs are realleged.

26. The Debtor's discharge should be denied under 11 U.S.C. § 727(a)(5) because he has failed to explain satisfactorily, before a determination of denial of discharge, any loss of assets or deficiency of assets to meet his liabilities.

COUNT VI—11 U.S.C. § 727(a)(6)(A)

All allegations of the preceding paragraphs are realleged.

27. The Debtor's discharge should be denied under 11 U.S.C. § 727(a)(6)(A) because the Debtor has intentionally violated the Automatic Stay of 11 U.S.C. § 362(a), and the Court's Order of Relief by pursuing appellate proceedings in the Fourth District Court of Appeals of the State of Florida despite having failed to seek stay relief, and having been warned of the same by these creditors.

COUNT VII—11 U.S.C. § 727(a)(7)

All allegations of the preceding paragraphs are realleged.

28. The Debtor's discharge should be denied under 11 U.S.C. § 727(a)(7) because the Debtor had with intent to hinder, delay, or defraud a creditor transferred, removed or permitted to be transferred and removed property of Dobrick, Inc.'s bankruptcy estate contrary to 11 U.S.C. § 727(a)(2)(B) after the date of the filing of the Dobrick, Inc. petition, and within one year of the Debtor's having filed his Chapter 7 bankruptcy petition, while he was an insider of that corporation.

COUNT VIII—11 U.S.C. § 523(a)(6)

All allegations of the preceding paragraphs are realleged.

29. The Plaintiffs allege that the damages they have sustained are a direct result of the Debtor's willful and malicious collusion with others in hindering, delaying and defrauding Plaintiffs as creditors of Raymond H. Alfonso, who have rights to his property in execution of their claims against Alfonso. Accordingly, the Plaintiffs allege that as a result of their injury and damages, and the will-

ful and malicious actions taken by the Debtor to injure and damage them, the Judgment aforepled is non-dischargeable and should be declared non-dischargeable, since it represents injuries and damage suffered by the Plaintiffs through the willful and malicious conduct of the Debtor, and in his interfering with their property rights.

WHEREFORE, the Plaintiffs prays that this Court grant Judgment against the Debtor and Defendant, MARVIN BROXMEYER, a/k/a MARVIN GLICK, denying the discharge of the Debtor, or in the alternative, excepting their Judgment against the Debtor from discharge, together with any and all such other and further relief as this Court deems Meet, necessary and proper.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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Bankruptcy Case No. 93-11453-BKC-AJC

IN RE MARVIN BROXMEYER,
*Debtor*

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Adversary Proceeding No. 93-1185-BKC-AJC

PAUL ELIE & EDGAR C. ELIE,
*Plaintiff*

VS.

MARVIN BROXMEYER,
*Defendant*

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NOTICE OF ENTRY OF JUDGMENT

On July 1, 1994, the following order was entered:

JUDGMENT DENYING DISCHARGE

On July 27, 1994, the order was entered on the court's docket.

Date July 27, 1994

KAREN EDDY
Clerk of the Bankruptcy Court

By: /s/ Ida Dixon
IDA DIXON
Deputy Clerk

[Filed July 26, 1994]

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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Case No.: 93-11453-BKC-AJC
93-12447 BKC-AJC

Chapter 7

IN RE: MARVIN BROXMEYER a/k/a Marvin Glick
*Debtor.*

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Adversary: 93-1185-BKC-AJC-A

Chapter 7

PAUL ELIE and EDGAR C. ELIE,
*Plaintiffs,*

v.

MARVIN BROXMEYER, a/k/a MARVIN GLICK, DEBTOR,
*Defendant.*

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JUDGMENT DENYING DISCHARGE

In conformity with the Nunc Pro Tunc Order of Default Judgment Denying Discharge and Setting Evidentiary Hearing Substituting Final Order of Default Judgment Denying Discharge Dated May 18, 1994, and pursuant to Bankr. R. 9021, it is hereby:

ORDERED AND ADJUDGED that the debtor, MARVIN BROXMEYER, a/k/a MARVIN GLICK, is not entitled to a discharge under 11 U.S.C. § 727(a)(2); 11 U.S.C. § 727(a)(3); 11 U.S.C. § 727(a)(4)(A); 11 U.S.C. § 727(a)(4)(D); 11 U.S.C. § 727(a)(5); 11

U.S.C. § 727(a)(6)(A); 11 U.S.C. § 727(a)(1); and specifically the Debtor is hereby denied discharge with respect to his obligations to the Plaintiffs pursuant to 11 U.S.C. § 523(a)(6).

DONE AND ORDERED at Miami, Florida this 1 day of July, 1994.

/s/ A. Jay Cristol
HONORABLE A. JAY CRISTOL
Chief Judge United States
Bankruptcy Court

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

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Case No.: 93-12447 BKC-AJC

Chapter 7

IN RE: MARVIN BROXMEYER a/k/a Marvin Glick
*Debtor*

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Adversary: 93-1185-BKC-AJC-A

Chapter 7

PAUL ELIE and EDGAR C. ELIE,
*Plaintiffs,*

v.

MARVIN BROXMEYER, a/k/a MARVIN GLICK, DEBTOR,
*Defendant.*

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MEMORANDUM ORDER ON PLAINTIFFS' MOTION TO REINSTATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

THIS CAUSE came on before the Court on its 9:30 a.m. docket of August 15, 1994, upon the Plaintiff's Motion to Reinstate Findings of Fact and Conclusions of Law, and the Court having heard arguments of counsel and having considered the proposed order submitted by Mr. Broxmeyer and the amendment of his counsel in his letter dated August 17, 1994, and otherwise being advised in the premises, it is

ORDERED AND ADJUDGED that the Plaintiffs' Motion be and the same is hereby DENIED as unnecessary for the reasons set forth below:

On May 18, 1994, this Court entered a final order of default judgment against the Debtor/Defendant, MARVIN BROXMEYER, a/k/a MARVIN GLICK. The Order was occasioned by the Debtor/Defendant's *voluntary* default, as announced by the Debtor/Defendant's former counsel, in this adversary proceeding objecting to his discharge.

The Order of May 18, 1994 contained findings of fact and conclusions of law which tracked the allegations of the complaint and the exhibits attached thereto.

Subsequent to the entry of the Order of May 18, 1994, the Debtor filed a motion to alter or amend the final order of default judgment, arguing that findings of fact and conclusions of law are unwarranted in a defaulted adversary complaint. Based upon this, the May 18, 1994 Order was vacated. A Final Judgment Denying Discharge was entered on July 1, 1994. A nunc pro tunc order of default judgment was entered on July 25, 1994 and substituted for the May 18, 1994 Order, excluding the findings of fact and conclusions of law, but reserving jurisdiction to further consider the issue.

The Plaintiffs/Creditors herein filed an eight count adversary complaint. The Defendant/Debtor, by consenting to a voluntary default, is *thereby deemed to have admitted* the allegations of the complaint as a matter of law. MARVIN BROXMEYER is therefore *conclusively* deemed to have admitted the allegations that he is not dischargeable from his debts, according to Counts I through VII of the Complaint under the various sections of 11 U.S.C. § 727(a), *et seq.*, and that he is liable on the specific debt that he owes the Plaintiffs/Creditors, PAUL ELIE and EDGAR C. ELIE, pursuant to 11 U.S.C. § 523(a)(6). That is the law of the case.

The allegations of the adversary complaint, in effect, become the findings of fact and conclusions of law and bind the Debtor for Res Judicata purposes. *Brown v.*

*Kenron Aluminum and Glass Corporation*, 477 F.2d 526 (8th Cir. 1973) at page 531. A judgment by default is as conclusive an adjudication of the issues for purposes of res judicata as a judgment rendered after a trial on the merits. *Id.* See *Lane v. Peterson*, 899 F.2d 737 (8th Cir. 1990), *cert. den.*, 498 U.S. 823. As such, no further findings of fact or conclusions of law are necessary, the judgment is Res Judicata.

For all of the foregoing reasons, there will be no additional findings of fact and conclusions of law rendered in this specific adversary proceeding.

DONE AND ORDERED at Miami, Florida this 22 day of August, 1994.

/s/ A. Jay Cristol
HONORABLE A. JAY CRISTOL
Chief Judge United States
Bankruptcy Court

IN THE CIRCUIT COURT
OF THE 17TH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

Case No.: 90-37325 (18)

JUDGE: W. HERBERT MORIARTY

PAUL ELIE and EDGAR C. ELIE,
*Plaintiff,*

vs.

LEVLEX ENTERPRISES, LTD.,
a New York corporation, *et al.*,
*Defendants.*

## FINAL JUDGMENT

THIS CAUSE having come before the Court for consideration of Defendants, Marvin and Judith Broxmeyer's Motion For Entry Of Final Judgment In Accordance With Appellate Mandate, For Final Judgment Awarding Restitution, and For Relief From Ancillary Final Judgments and Orders. The Court having reviewed the motion, the response thereto, heard argument of counsel, and being otherwise fully advised, finds and concludes as follows:

On August 26, 1992, this court entered a final judgment in the amount of $1,700,000.00 in favor of Paul Elie and Edgar Elie (hereinafter ELIES) against five defendants, Marvin Broxmeyer (hereinafter MARVIN), Judith Broxmeyer (hereinafter JUDITH), and three corporations they controlled, Royal Rehab Corp. (hereinafter ROYAL REHAB), Cantor Samuel, Inc. (herein-

after CANTOR SAMUEL), and Levlex Enterprises, Ltd. (hereinafter LEVLEX). The Defendants, filed an appeal with the Fourth District Court of Appeal, however, they did not post a supersedeas bond to stay the final judgment while on appeal. Consequently, the ELIES executed on the final judgment, pursued discovery in aid of execution, filed proceedings supplementary and sought collection of the judgment.

Thereafter, Dobrick, Inc. (hereinafter DOBRICK) and Restoration Resources, Inc. (hereinafter RESTORATION RESOURCES) were impleaded into this action as third party Defendants pursuant to proceedings supplemental. In their efforts to collect their judgment, the ELIES recovered substantial monies that were payable to RESTORATION RESOURCES.

The ELIES continued their collection efforts and eventually obtained monies, stock and property from other sources. The ELIES acquired the outstanding shares of stock of LEVLEX, DOBRICK, ROYAL REHAB and 90% of CANTOR SAMUEL. The ELIES then became the sole shareholders, officers and directors of the corporations. The ELIES passed resolutions terminating previous counsel and retaining new counsel for the corporations. New counsel were directed to voluntarily dismiss LEVLEX's, ROYAL REHAB's AND CANTOR SAMUEL's pending appeals against the ELIES. LEVLEX, ROYAL and CANTOR SAMUEL filed notices with the Fourth District Court of Appeal "confessing error" in having filed the appeals of the August 26, 1992, final judgment. These notices formally dismissed LEVLEX's, ROYAL REHAB's and CANTOR SAMUEL's appeals.

On November 16, 1994, the Fourth District Court of Appeal reversed the final judgment dated August 26, 1992 only as to the BROXMEYERS and directed on remand that this court enter judgment in favor of the BROXMEYERS. The ELIES filed a motion for rehearing on

December 1, 1994 which was denied on December 28, 1994. The BROXMEYERS also on January 4, 1995, filed a Motion to Withdraw Notices of Voluntary Dismissal and to Reinstate Appeal of LEVLEX, ROYAL REHAB and CANTOR SAMUEL with the Fourth District Court of Appeal. After reviewing the motion, the Appellate Court ordered it be struck as untimely.

The ELIES oppose these motions and contend that the BROXMEYERS are not entitled to restitution since there were several execution creditors holding judgments against them at the time the ELIES purchased stock in the corporations. Further, the ELIES contend that the BROXMEYERS are not entitled to return of the stock as the Appelate Court has already determined this issue. The ELIES also maintain that the BROXMEYERS do not have standing since they are in bankruptcy and only the bankruptcy trustee has standing to seek restitution. Finally, the ELIES assert that they are entitled to a jury trial on all claims of restitution.

Pursuant to the mandate from the Fourth District Court of Appeal filed November 16, 1994, the final judgment of August 26, 1992 must be vacated as to Marvin and Judith Broxmeyer only. Furthermore, the BROXMEYERS are entitled to judgment in their favor. However, the original corporate Defendants, ROYAL REHAB, CANTOR SAMUEL and LEVLEX remain bound by the original August 26, 1992 judgment as they voluntarily dismissed their appeals and the appellate court struck their motion to vacate the dismissals.

A party who surrenders property under an erroneous judgment is entitled to be restored to all that he has lost upon a reversal of the judgment. *Sundie v. Haran,* 253 So. 2d 857, 858 (Fla. 1971); *Baum v. Heiman,* 528 So. 2d 63 (Fla. 3rd DCA 1988); *Home Savings & Loan Assoc. of FL v. Epperson,* 427 So. 2d 246, 247 (Fla. 4th DCA 1983); *Lofter v. Rashide,* 523 So. 2d 1230, 1231 (Fla. 3rd DCA 1988); *Dixie County Sheriff's Dept.*

*v. Forfeiture of 1987 Ford Van*, 592 So. 2d 748, 749 (Fla. 1st DCA 1992); *Sheriff of Alachua County v. Hardie*, 433 So. 2d 15, 16 (Fla. 1st DCA 1983). Hence, a trial judge has the power to compel restitution when his judgment has been reversed by a higher court. *State v. Hearn*, 99 So. 2d 231, 233 (Fla. 1957) and *Baum* at 63.

In the instant case, this court finds that due to the opinion of the Fourth District Court of Appeal reversing the judgment against the BROXMEYERS, Judith and Marvin Broxmeyer are entitled to restitution of all assets they personally surrendered as a result of the erroneous judgment. However, since the BROXMEYERS are involved in a pending bankruptcy, all assets returned must be submitted to the court registry until a determination is made regarding the rights of other judgment creditors. Additionally, the impleaded Defendant corporations, DOBRICK and RESTORATION RESOURCES, are entitled to restitution as a result of the erroneous judgment. This Court finds that the other arguments set forth by the ELIES are unpersuasive and lack relevant authority to support their position.

Furthermore, Fla. R. Civ. P. 1.540(b)(5) provides that a court may relieve a party from a final judgment, decree or order where it was based upon a prior final judgment, decree or order that has been reversed. Accordingly, the BROXMEYERS and the impleaded Defendants are entitled to be relieved from all ancillary judgments and orders entered against them as a result of the erroneous judgment of August 26, 1992.

Therefore, it is hereupon,

ORDERED AND ADJUDGED that this court's final judgment of August 26, 1992 is vacated only as to the BROXMEYERS and judgment is hereby entered in favor of Judith Broxmeyer and Marvin Broxmeyer.

IT IS FURTHER ORDERED AND ADJUDGED that Judith and Marvin Broxmeyer and the impleaded

Defendants are entitled to restitution of all monies and properties recovered by the ELIES as a result of the erroneous judgment, including but not limited to:

1. a return to Marvin Broxmeyer of all his shares of stock in ROYAL REHAB and CANTOR SAMUEL;

2. a return to Judith Broxmeyer of all her shares of stock in LEVLEX ENTERPRISES and DOBRICK;

3. a return to RESTORATION RESOURCES of all monies recovered by the ELIES that were otherwise held by or payable to that corporation;

4. a return to Judith Broxmeyer of all monies recovered by the ELIES from the proceeds of the sale of her former residence;

5. a restoration of the status quo ante as to the Broxmeyers and those Defendants impleaded by the ELIES through proceedings supplemental.

IT IS FURTHER ORDERED AND ADJUDGED that all assets shall be returned to the registry of the court, not the BROXMEYERS, pending a determination of other judgment creditors' rights.

IT IS FURTHER ORDERED AND ADJUDGED that all judgments and orders against Judith or Marvin Broxmeyer or the impleaded Defendants that were based upon the erroneous August 26, 1992 judgment be vacated, including:

1. the March 9, 1993, final judgment against RESTORATION RESOURCES and Judith Broxmeyer;

2. the March 24, 1993, final judgment against DOBRICK and Judith Broxmeyer;

3. the July 15, 1993, final judgment against DOBRICK and Judith Broxmeyer;

4. the November 4, 1994, judgment in garnishment entered against Marc Broxmeyer, Neil Binder, Bellmarck Realty, Inc. and Bellmarc Operating Companies, Inc.; and

5. any and all restraining orders and injunctions against the BROXMEYERS or impleaded Defendants.

IT IS FURTHER ORDERED AND ADJUDGED that the BROXMEYERS are entitled to an accounting as to all monies and properties recovered by the ELIES, directly or indirectly, under the erroneous final judgment of August 26, 1992, and all subsequently entered judgments and orders based thereon.

IT IS FURTHER ORDERED AND ADJUDGED that this court shall reserve jurisdiction in this matter to award taxable costs under Fla. R. App. P. 9.400(a).

DONE AND ORDERED in Chambers, at Fort Lauderdale, Broward County, Florida, this 31st day of May, 1995.

/s/ W. Herber Moriarty
W. HERBERT MORIARTY
Circuit Court Judge